

Key Aspects under FEMA Inbound Regulations

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WIRC

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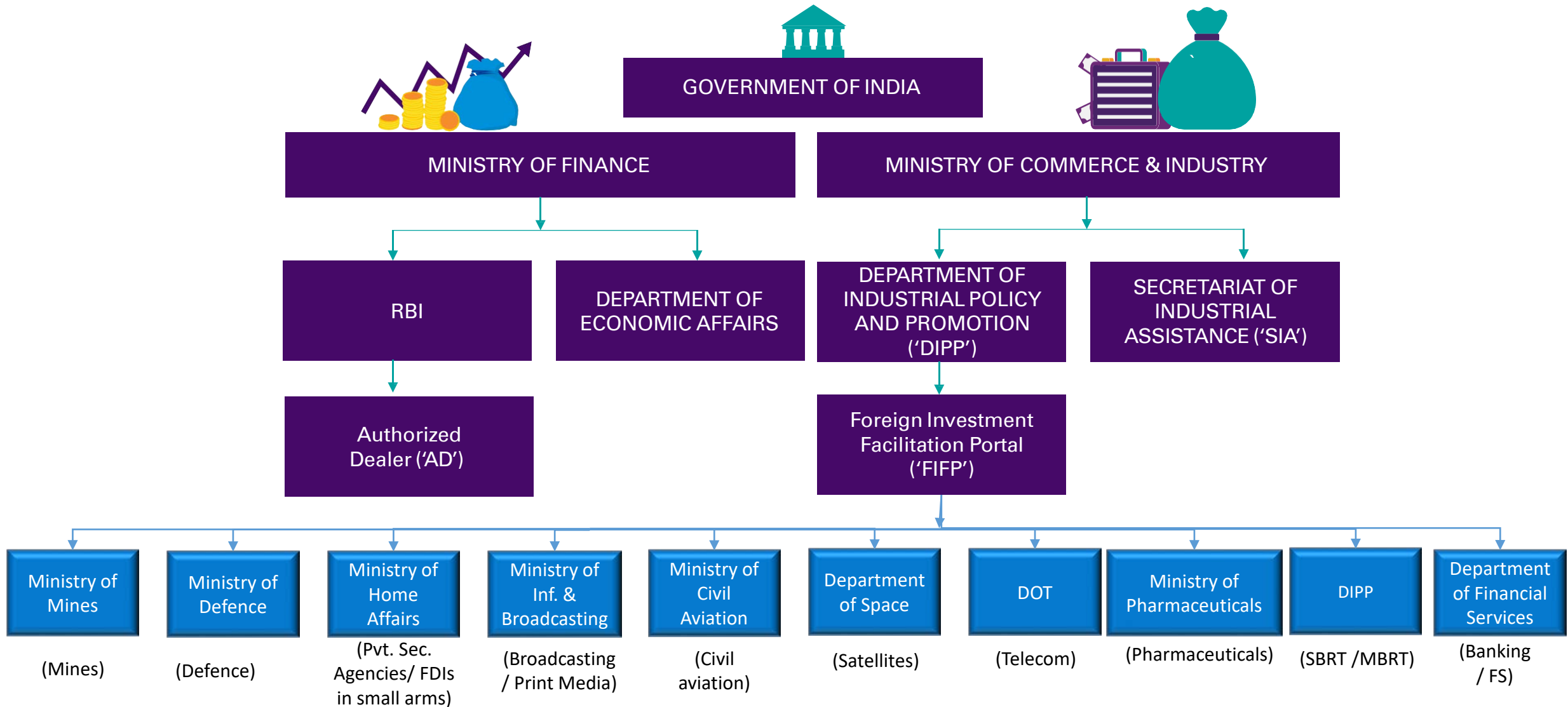
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Inbound Investment

- A walk through



FEMA Regulators



Regulators - Roles and Responsibilities

DIPP

- Formulation & implementation of ind. policy
- Developing strategies for industrial promotion
- Monitoring industrial growth
- Advice on all technical matters to various industries
- Formulation of FDI policy and promoting/ facilitating flow of FDI
- Issue of standard operating procedures for processing FDI proposals
- Issue of equity shares against import of capital goods / pre-incorporation expenses

SIA

- Acts as a gateway to industrial investment into India
- Assists entrepreneurs & investors in setting up new projects
- Liaise with Government bodies to seek necessary clearance/ approvals

FIFP*

- New online single point interface of the Government of India for investors to facilitate FDI in India
- Facilitates the single window clearance of applications which are under approval route
- List of administrative departments/ ministries provided

CCEA

- Considers and approves FDI proposals involving foreign equity inflow of more than INR 5,000 crore

**FIPB was abolished during April 2017 and was replaced by FIFP*

What Documents to refer ?

Press Release

Key decisions of the Government are disseminated through Press Releases ahead of the actual Notification/ Press Note

Press Note

In practice, regulators expect that a Press note is relied upon even if not backed by a circular/ notification

Notification / A.P.. DIR Series Circulars

Changes in FEMA regulations informed to AD banks vide these circulars

Consolidated FDI Policy

Aimed at consolidating all the Press Notes, Press Releases, Clarifications, Circulars issued on a particular matter. Issued annually by the DIPP in April-May

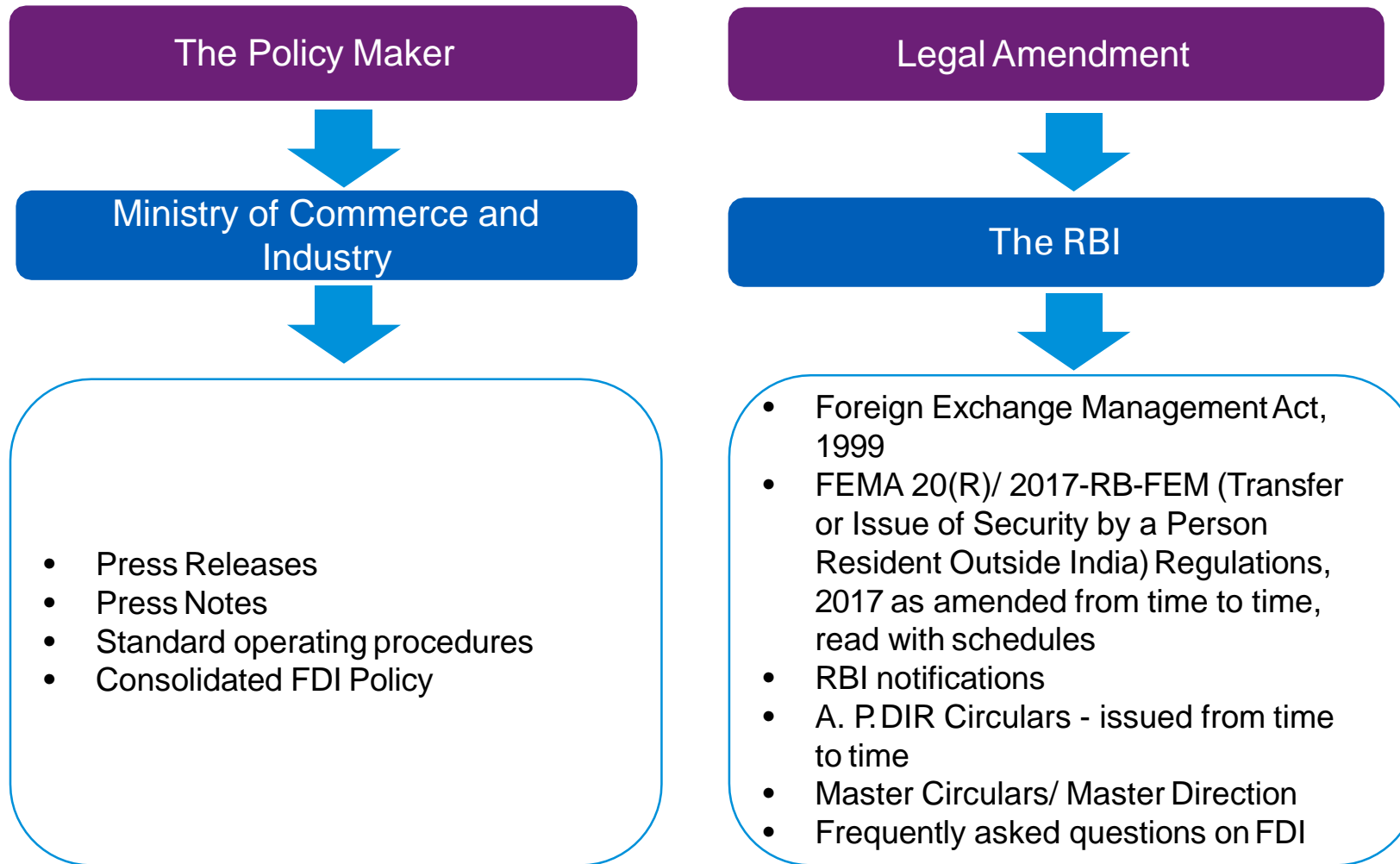
Master Direction/ Circular

Consolidates all AP DIR Series Circulars. Issued annually and updated on a regular basis

Frequently Asked Questions (FAQs)

Provides answer to frequently asked questions relating to FEMA

Inbound Investment - Statutes



Foreign Direct Investment



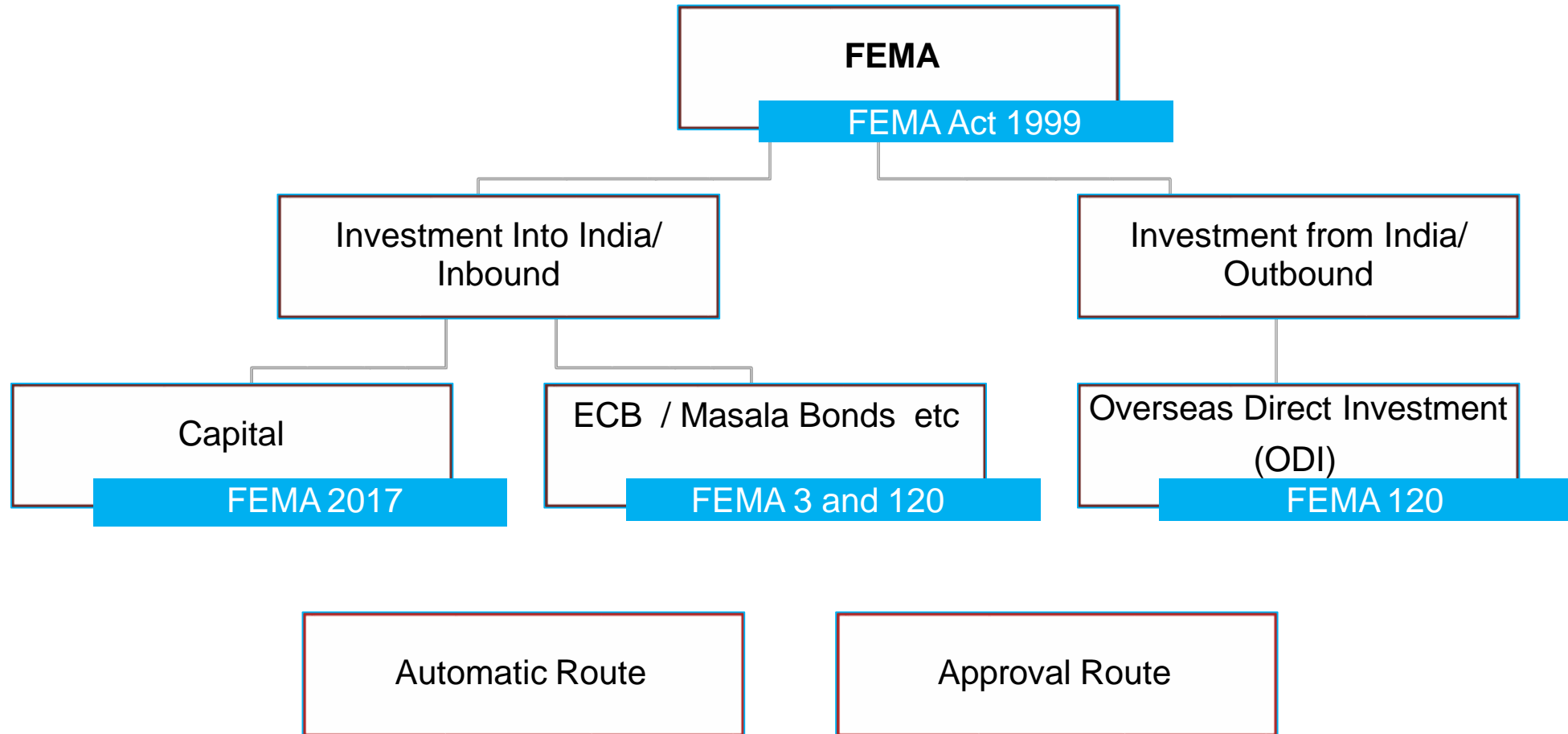
FDI Equity Inflows over the Century

Country-wise FDI equity inflows		
APRIL 2000 TO MARCH 2018		
Source	\$ (billion)	Share (%)
Mauritius	127.58	33.8
Singapore	66.77	17.7
Japan	27.29	7.2
UK	25.44	6.7
Netherlands	23.48	6.2
US	22.42	5.9
Germany	10.84	2.9
Cyprus	9.57	2.5
France	6.24	1.7
UAE	5.75	1.5

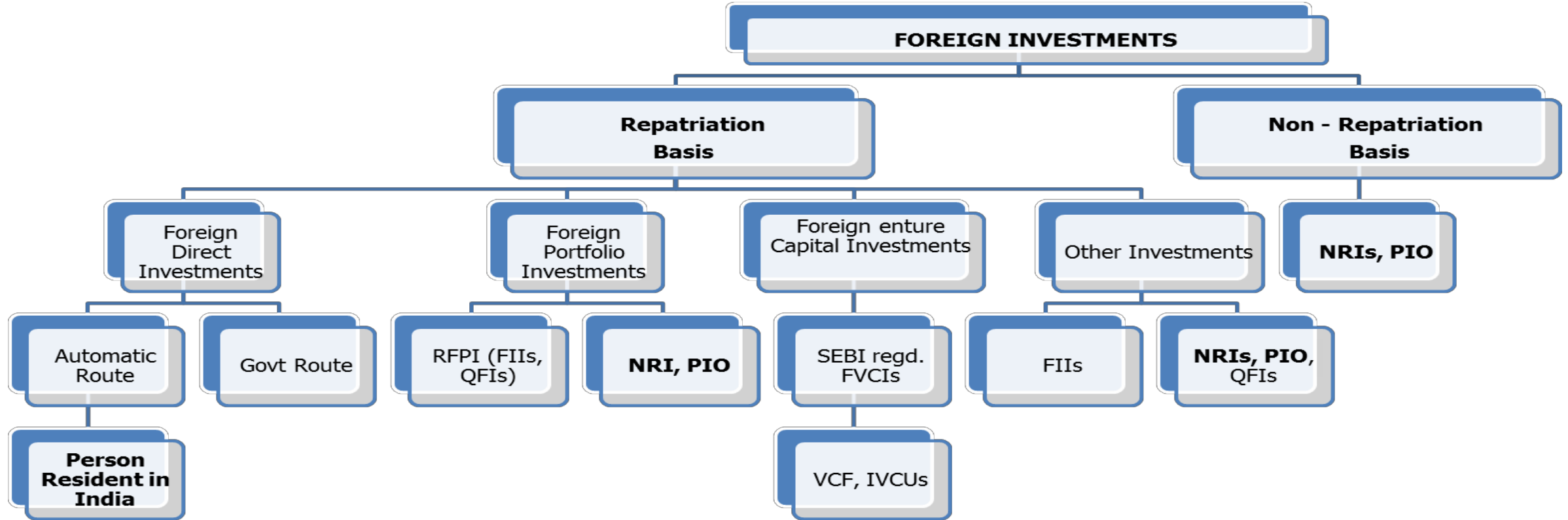
Sector-wise FDI equity inflows		
APRIL 2000 TO MARCH 2018		
Source	\$ (billion)	Share (%)
Services	66.19	17.6
Software, hardware	30.82	8.2
Telecom	30.16	8.0
Constr. Dev. (realty)	24.83	6.6
Auto	18.76	5.0
Trading	18.56	4.9
Drugs & Pharma	15.72	4.2
Chemicals	14.60	3.9
Power	13.21	3.5
Constr. (Infra)	12.55	3.3

Source: Lok Sabha, dipp.nic.in

FEMA landscape



Foreign Investment - Chart



Schedules to FEMA 20(R)/ 2017

Schedule 1

Purchase/ Sale of capital instruments of an Indian company by a person resident outside India

Schedule 2

Purchase/ Sale of capital instruments of a listed Indian company on recognized stock exchange by FPI

Schedule 3

Purchase/ Sale of capital instruments of a listed Indian company on recognized stock exchange by NRI or OCI on repatriation basis

Schedule 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

FEMA 2017 – FEMA (Transfer or Issue of Security by a Person Resident Outside India) Regulations 2000 as amended from time to time, read with Schedules

Schedule 9

Investment in Depository receipts by a person resident outside India

Schedule 10

Issue of Indian Depository Receipts (IDRs)

Schedule 5

Purchase and sale of securities other than capital instruments by a person resident outside India

Schedule 6

Investment in a Limited Liability Partnership (LLP)

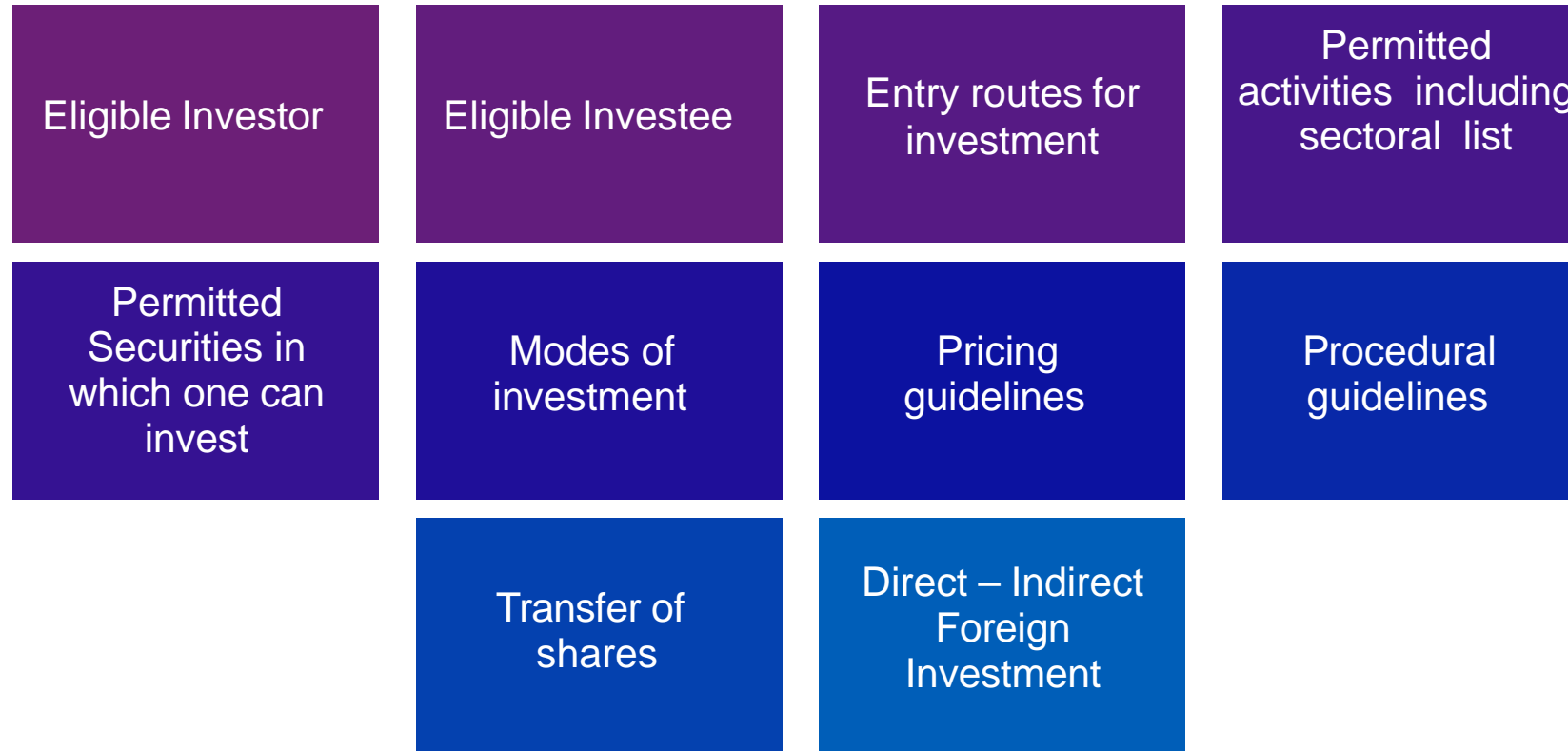
Schedule 7

Investment by a Foreign Venture Capital Investor (FVCI)

Schedule 8

Investment by a person resident outside India in an Investment Vehicle

FDI – Schedule 1 – Key aspects



FDI – Schedule 1 – Key aspects

Eligible Investor

- Person resident outside India ('PROI') or an Entity incorporated outside India
- Citizen of or an entity incorporated in Bangladesh or Pakistan - **Under Government approval route**
- A citizen or an entity incorporated in Pakistan can invest under **Government approval route** in sectors/ activities other than defence, space and atomic energy and sectors/ activities prohibited for foreign investment
- **FEMA 2017** has removed the concept of Person of Indian Origin ("PIO") and substituted the reference to Overseas Citizen of India ("OCI")

Eligible Investee

- An Indian Company and LLP (**Nov 2017**) – which may issue permissible capital instruments

Sectoral Cap

- Foreign investment on a **repatriation basis (FEMA 2017)** by persons resident outside India in capital instruments of a Company or Capital of an LLP, as the case may be; &
- Indirect foreign investment
- **Note:**
 - FCCBs and Depository Receipts in the nature of debt shall not be included
 - Any equity holding resulting from conversion of debt shall be included in sectoral cap.

Sectors not included in the sectoral list - 100% FDI Permitted E.g. Service Sector

Investments under Approval Route

Relates to investment in sectors that require prior Government approval –i.e. outside the Automatic Route and also do not relate to prohibited sectors

- Sectors in which FDI can be undertaken only with prior Government approval (e.g. Defense, etc.)
- Citizens / Entities incorporated in Pakistan and Bangladesh
- FDI from Pakistan and Bangladesh allowed under Approval Route subject to certain sector restrictions
- Other cases (Transfer of shares to Non-Residents in regulated sectors / in certain cases and situations)
- Cases of investment by specified individuals / entities (Bangladesh / Pakistan, etc.)

- FDI in financial service sector other than those mentioned below under Regulation 16(F) of FEMA, 2017
 - Asset reconstruction,
 - Banking,
 - Infrastructure
 - Commodity spot exchanges,
 - Power Exchanges
 - Credit information,
 - Insurance
 - Pension sector
 - Other financial Services regulated by Financial sector regulators – RBI, SEBI, IRDA, NHB, PFRDA

Investment under Automatic or Approval route ?

Swap of shares (any capital instrument can be issued by Indian Company)

Import of capital goods/ machinery/ equipment (excluding second-hand machinery)

Pre-operative/ pre-incorporation expenses (including payments of rent etc.) (5% of Authorised capital or USD 5,00,000 which ever is less)

FDI in investing companies registered as NBFCs with the RBI

Issue of equity shares against payables

FDI in Core investment companies (CICs), engaged in the activity of investing in the capital of other Indian entities

FDI in an Indian Company which has no operations and no downstream investments ?

Recent FEMA updates



FEMA Changes and Liberalization in key sectors (FEMA 2018) – Nov 2017/Jan 2018

To liberalize the FDI policy further,. The key amendments in FEMA 2018 are as under:

Sector	Amendment
Single brand retail trading and Plantation (Tea, Coffee and Rubber)	100% under Automatic Route
Construction development	Real estate broking services does not amount to ' real estate business ' and hence, 100% FDI permitted under the automatic route
Civil aviation	Foreign airlines allowed to invest up to 49% under approval route in Air India
Power Exchanges	FII/ FPIs allowed to invest through primary market in addition to the secondary market

In addition to above:

- **Swap of Shares by Investment Vehicle:** An investment vehicle is also allowed to issue its units to a person resident outside India against swap of capital instruments of a Special Purpose Vehicle (SPV) proposed to be acquired by such investment vehicle
- **Pledge:** PROI is now allowed pledging of **capital instruments** of the Indian Company as well as **units of an investment vehicle**, including units of REITS, InvITs and AIFs etc in favour of banks.(earlier only Shares / CCDs)
 - PROI can now pledge **capital instruments (listed as well as unlisted)** of any Indian Company in favour of NBFC (earlier only listed shares)
- **Delay in reporting :** Delay in reporting requirement will now attract late fees.

Whether Compounding application still to be made ?

FEMA Update - Press Release (April 2018) - FDI in financial services sector

Nature of Activity	Types of Activities	Minimum Capitalisation (USD)
Fund-based activities (Managing money and custody of assets)	Merchant Banking, Under Writing, Portfolio Management Services , Stock Broking, Asset Management, Venture Capital, Custodian Services, Factoring, Leasing and Finance, Housing Finance, Credit Card Business, Micro Credit and Rural Credit	20 million
Non-fund based activities (Fee Based services)	Investment advisory services , Financial Consultancy, Forex Broking, Money Changing Business and Credit Rating Agencies	2 million

- The entities that would be impacted with this requirement includes:
 - Portfolio management services
 - Foreign Private Equity Funds which has set up investment advisory arms
 - Investment advisory services provided to non-residents and not registered with SEBI (Investment advisor Regulation)
 - Foreign owned managers of Indian alternative investment funds which are not directly registered with SEBI

Asset Management entities of AIF will be considered as regulated by financial sector regulator if AIF is regulated ?

Whether entities already set up under old regulation with USD 0.5 Million capitalization under erstwhile FDI policy will have bring additional capital to comply with Minimum Capitalisation norms?

FEMA Update - June 2018 - Reporting in Single Master Form

- RBI with the objective of integrating the various reporting structures of foreign investment in India, has introduced a Single Master Form (SMF)
- **Filing by Whom** : SMF provide a facility for reporting total foreign investment in an Indian entity viz. company, LLP and other investment vehicles/ Real Estate Investment Trusts /Infrastructure Investment Trusts/Alternative Investment Funds
 - SMF form - SMF would substitute the requirement of individual reporting's currently being done through Form FC-GPR, FC-TRS, LLP-I, LLP-II, ESOP, CN, DRR,
 - **Form InVi and Form DI (Downstream investment) (Regulation 13 amended from 1 Sep 2018)**
- **Filing of FLA return** -The requirement of submitting annual statement of foreign liabilities and assets ('FLA') with RBI by 15 July of every year, shall, however, continue
- **Applicability** : With effect from **September 01,2018** all new filings for FC-GPR , FC-TRS , LLP-I , LLP-II and CN will be in SMF only. FC-GPR and FC-TRS shall not be filed on ebiz”.
- **Effect of not filling of SMF** - Indian entities not complying with this pre-requisite will not be able to receive foreign investment and will be considered non-compliant with Foreign Exchange Management Act, 1999 and regulations made thereunder.

Issues / Clarification in Reporting in Single Master Form

In case a company has received share application money and hasn't yet allotted shares as they have 60 days period to do so, then whether such details of share application money need to be captured in the "Entity Master" Form ?

What about an India company who currently do not have any foreign shareholders however may have one in coming months/near future? Do they need to register now during this interface period as NIL Report. OR Do they have to register prior to receipt of FDI OR Do they have to register post receipt of FDI?

In case any company has issued Compulsorily Convertible Debentures or Compulsorily Convertible Preference Shares or Convertible Notes – How details to be captured in SMF?

In case of downstream investment – Which Company have to file form SMF / Entity Master File on the RBI portal ?

FEMA (Cross Border Merger) Regulations, 2018 and Merger/demerger (Reg. 9)



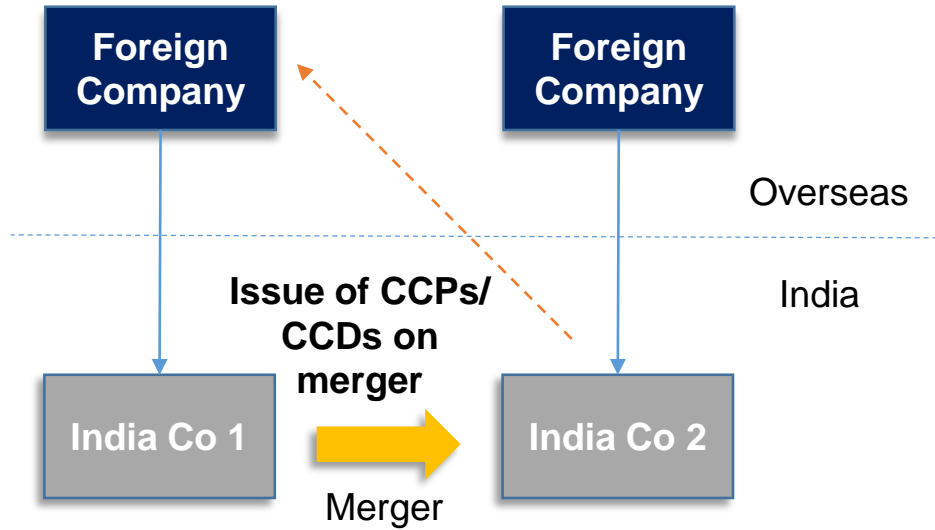


Merger/demerger of Indian Companies (Reg. 9)

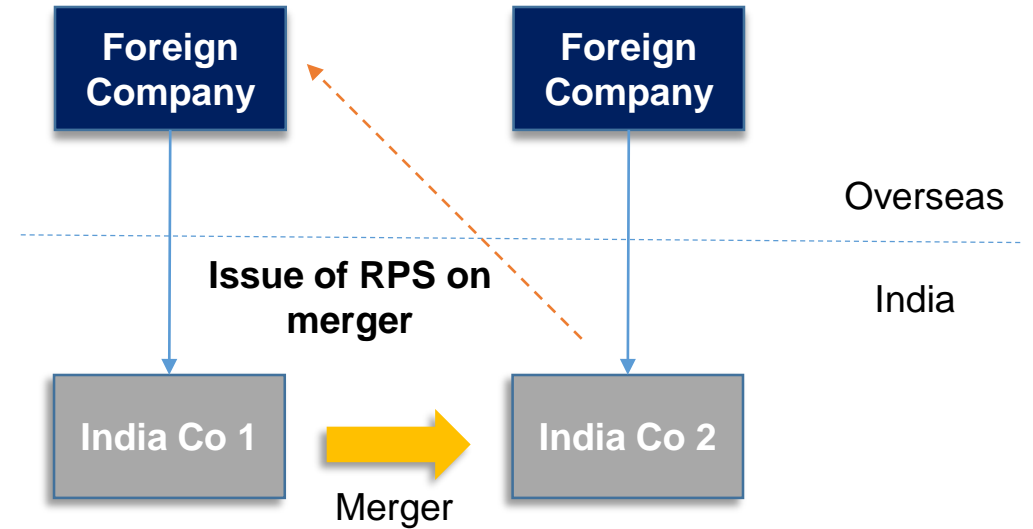
- General permission for issue of **capital instruments** to non-resident shareholders pursuant to merger/demerger of 2 or more Indian companies
- Capital instruments can be issued in case of merger / demerger
- Issue of capital instruments to be in compliance with sectoral caps
- Compliance with conditions mentioned in the regulation would be deemed approval by the RBI
- Transferor/Transferee/New company **not to engage in prohibited activities**
- Form FCGPR is required to be filed with RBI within 30 days from date of allotment of shares

Whether pricing guidelines apply to shares issued to PROI on merger/demerger?

Case Study - Issue of shares after merger / demerger of Indian Companies



Whether CCPS /CCDs can be issued pursuant to Scheme under automatic route?



Whether RPS can be issued pursuant to Scheme under automatic route?

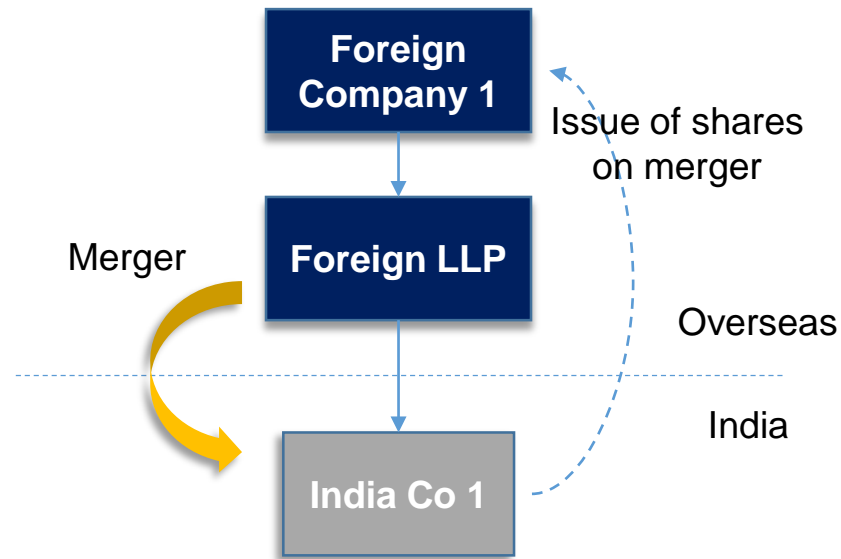
Background - FEMA (Cross Border Merger) Regulations, 2018

- **MCA had on 13 April 2017 notified Section 234 of the Companies Act 2013** (Companies Act) along with the applicable Rule¹ which provides for mergers and amalgamations between an Indian company and a foreign company
 - Merger of an Indian company with a foreign company incorporated in the prescribed jurisdictions
 - Merger of a foreign company with an Indian company
- In April 2017, RBI had released the draft Cross Border Regulations and on **20 March 2018** notified the Cross Border Regulations²
 - **“Cross border merger”** means any **merger, amalgamation or arrangement** between an Indian company and a foreign company in accordance with Rules notified under the Companies Act 2013
 - **‘Foreign company’** means any **company or body corporate** incorporated outside India whether having a place of business in India or not
 - **In case outbound merger- Foreign Co should incorporated in a jurisdiction specified** - Key countries like the USA, UK, Russia, Germany, France, Japan, China, Singapore, Mauritius, etc. will fall within the definition of eligible jurisdictions
 - **‘Indian company’** means a company incorporated under the Companies Act or under any previous company law.
 - **‘Resultant company’** means an **Indian company or a foreign company** which takes over the assets and liabilities of the companies involved in the cross border merger.

1. Rule 25A in Companies (Compromises, Arrangements and Amalgamations) Rules 2016

2. Foreign Exchange Management (Cross Border Merger) Regulations, 2018

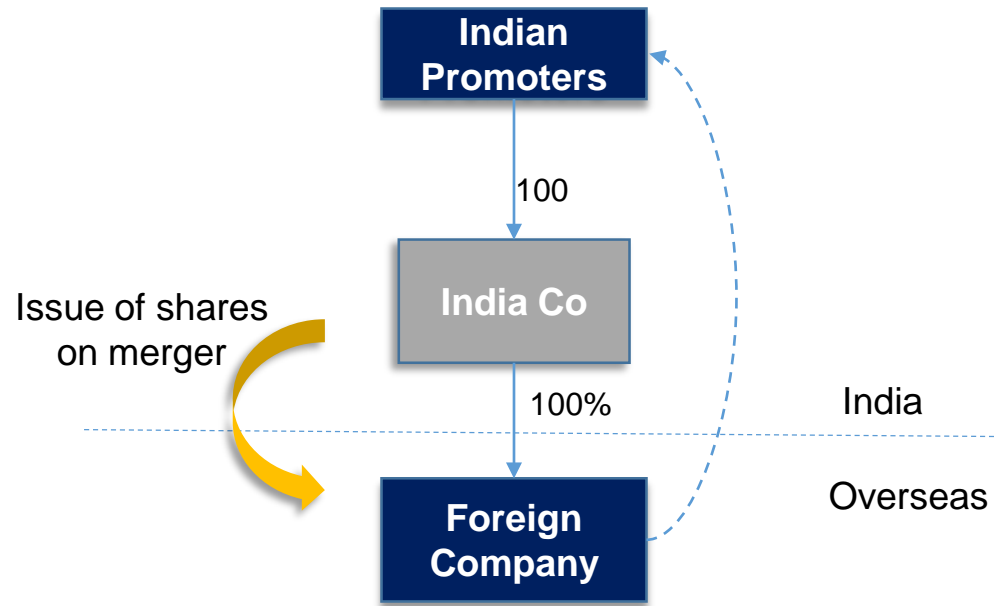
Inbound merger



‘**Inbound merger**’ means a cross border merger where the resultant company is an Indian company

- Any issue or transfer of security by the resultant Co to a person resident outside India shall be in accordance with Inbound Regulations, 2017 (**viz. pricing guidelines, entry routes, sectoral caps etc.**)
- Compliance with ODI regulations required in following cases:
 - Merger of foreign JV/WOS with Indian Co
 - Acquisition of step down subsidiary on merger of Foreign JV/WOS
- **An office outside India of overseas entity** shall be deemed to be the branch / office outside India of the Indian Company
- **Borrowings / guarantee** which would become the borrowing / guarantee of the Indian Company to comply with ECB / Trade Credit norms in period of 2 years (**No end use restrictions to shall not apply**)
 - **No remittance for repayment of liability from India within two years**
- Resultant Company permitted to acquire and hold asset outside India to the extent permitted under FEMA guidelines
 - **Asset or security** not permitted to be acquired or held under FEMA guidelines should be sold within two years from the date of sanction by the NCLT

Outbound merger



‘**Outbound merger**’ means a cross border merger where the resultant company is a foreign company

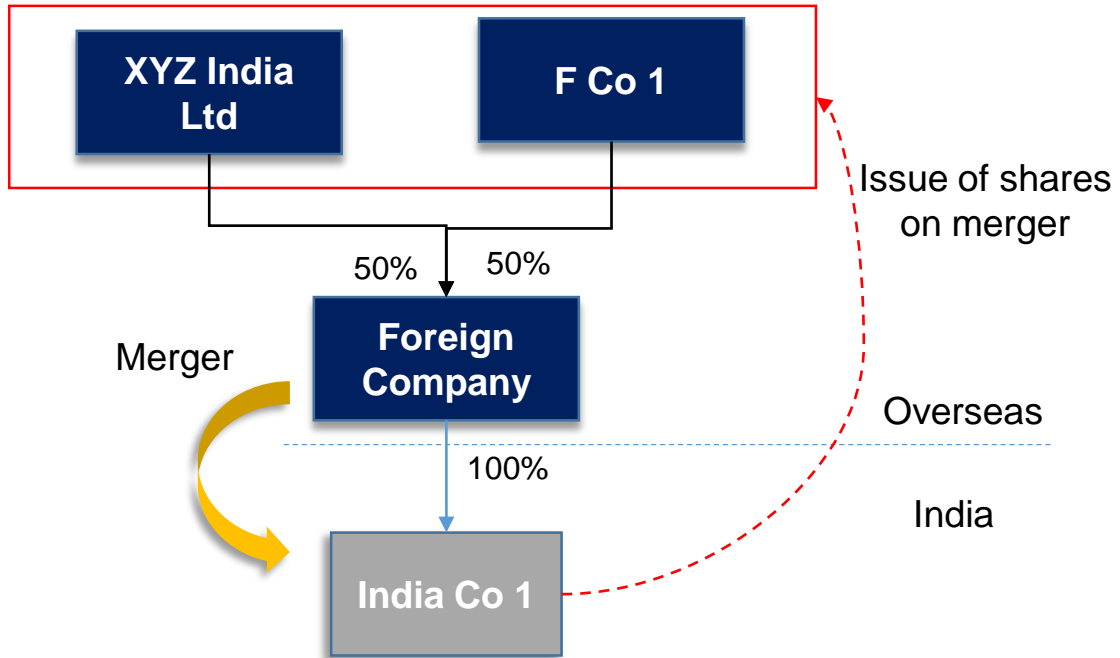
- Issuance of shares to be in compliance with **ODI Regulations**.
 - Further, in case of a resident individual, the same should be within the permissible LRS limits
- An office in India of the Indian Company shall be deemed to be the branch / office of the overseas entity
- The resultant company shall not acquire any liability payable towards a lender in India in Rupees which is not in conformity with the Act or rules or regulations framed thereunder
- **Borrowings / guarantee** which would become the borrowing / guarantee of the resultant overseas entity has to be paid as per the scheme sanctioned by NCLT.
 - No Objection Certificate to be obtained from lenders in India
- Resultant Company permitted to acquire and hold asset in India to the extent permitted under FEMA guidelines
 - **Any asset / liability of the Indian company** which is not permitted to be acquired by the overseas entity shall be liquidated within a period of 2 years



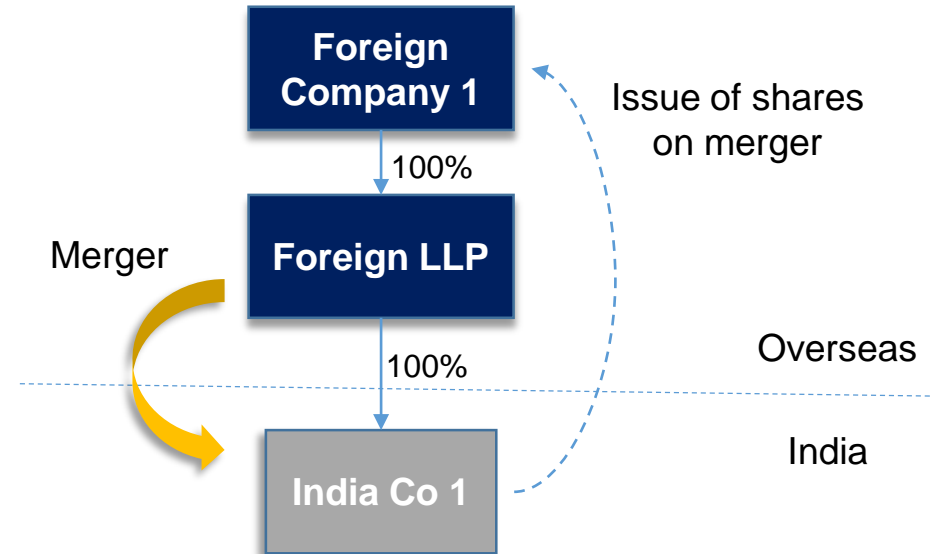
FEMA (Cross Border Merger) Regulations, 2018

Particulars	Other conditions
Valuation	Valuation of the Indian company and the foreign company to be in accordance with Rule 25A of the prescribed Co. Rules, i.e., internationally accepted principles on accounting and valuation
Regularisation of non-compliances	Companies to ensure completing requisite regulatory actions prior to merger with respect to any non-compliance, contravention, violation under FEMA
Reporting compliances	Certificate confirming compliance with above guidelines to be furnished by the managing director/ whole-time director and company secretary (if available) to be submitted to the NCLT
Compensation	Payment of compensation by the Resultant Company, to a holder of a security of the Indian company or the foreign company to be in accordance with the Scheme sanctioned by the NCLT.

Case Study - Cross Border Merger

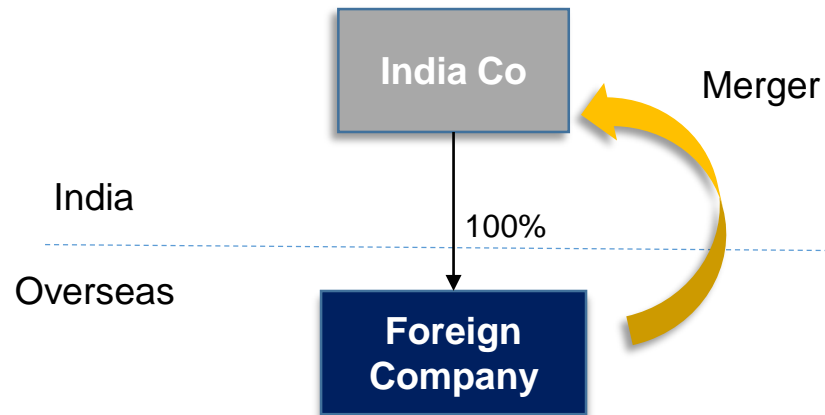


Whether Indian Company issuing shares to XYZ India permissible under automatic route?



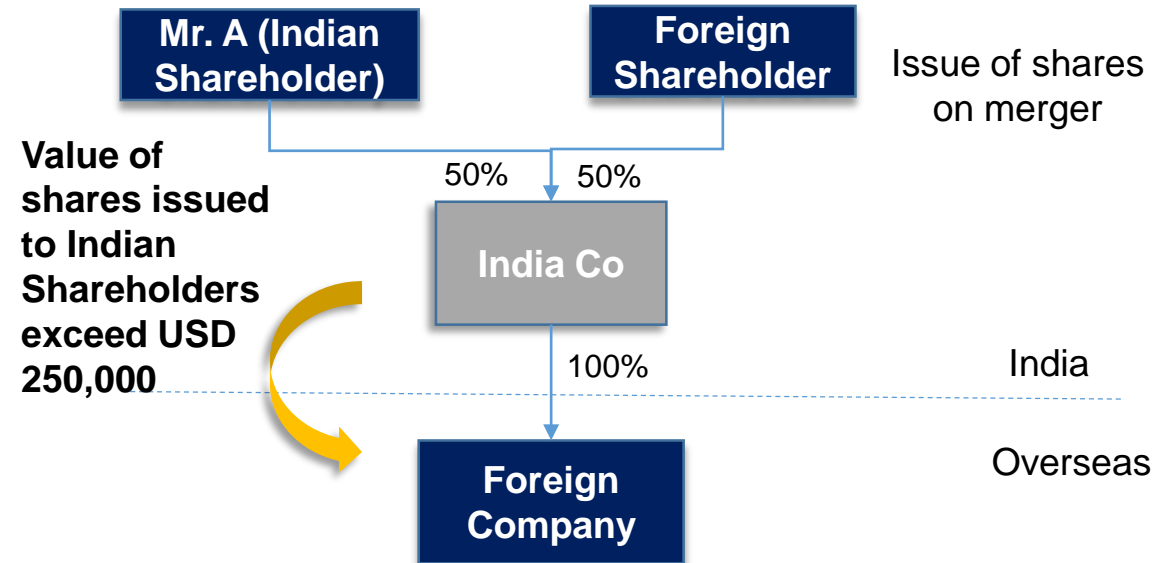
Whether Merger of Foreign LLP into Indian Company permissible ?

Case Study - Cross Border Merger



- I co hold 100% in Foreign Co
- F Co proposes to merger with I Co u/s Cos Act 2013 and no issues of shares on merger being WOS

Whether Fast Track Merger is possible u/s 233 of Cos Act



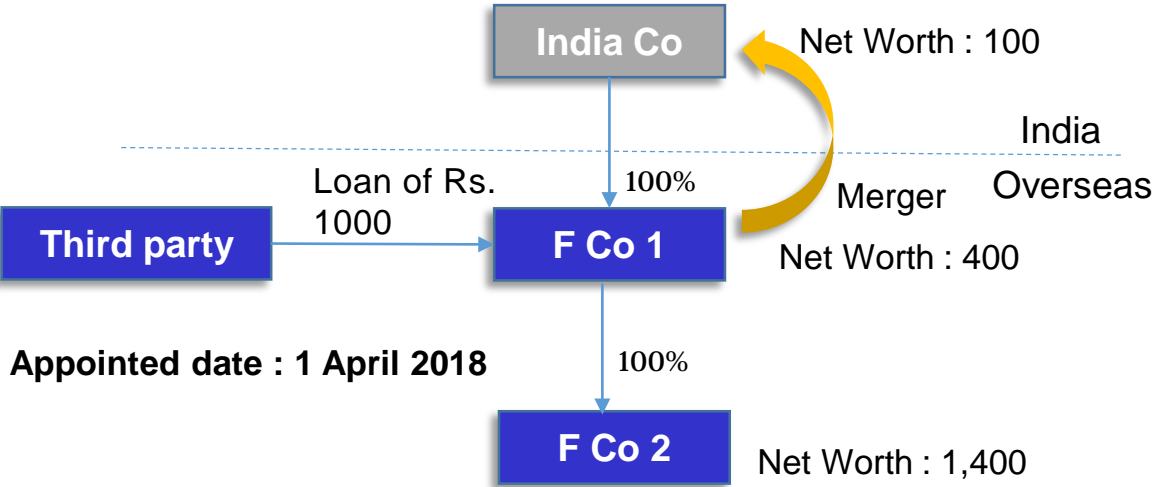
Value of shares issued to Indian Shareholders exceed USD 250,000

- Merger of F co into I co and I Co issues shares to the shareholders of Indian Company and Foreign Shareholders

Whether Foreign Company can issue shares to Mr. A under automatic route or approval route ?

Whether receipt of consideration in the hands of individual has to be evaluated on the basis of FMV or original value?

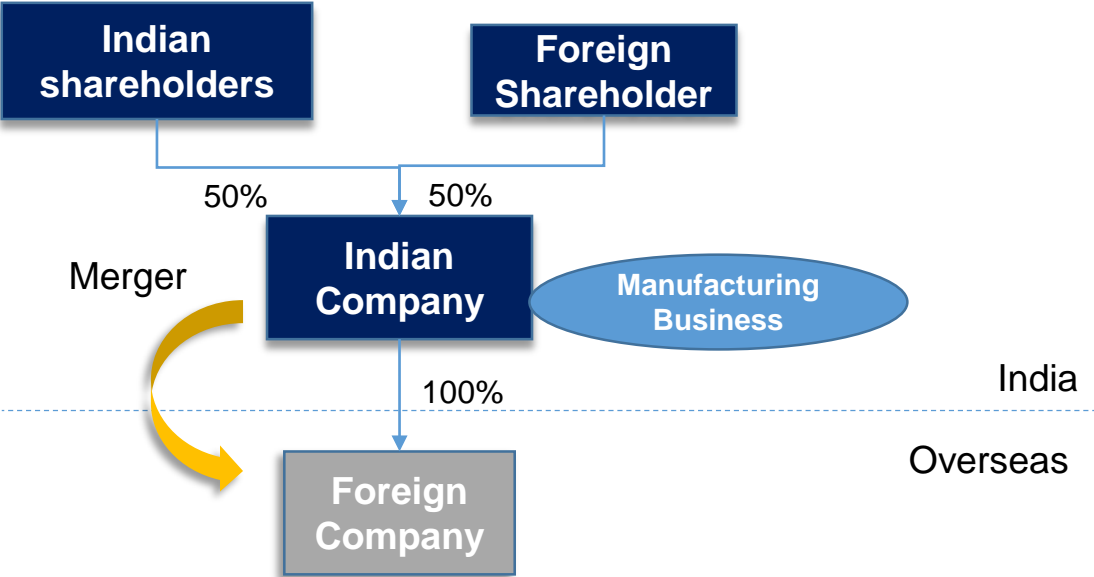
Case Study - Cross Border Merger



Appointed date : 1 April 2018

- I Co's net worth is 100. It has invested 400 in foreign subsidiary F Co 1
- F Co 1 borrowed Rs. 1,000 to invest Rs. 1,400 in F Co 2

Whether merger is permissible?



• Post merger, whether Foreign Company can carry business of manufacturing unit situated in India through India Office ?

Issues for discussion - Cross Border merger

In case of inbound merger, Whether end use restriction on overseas borrowing will continue to apply post completion of 2 years ?

Inbound Merger - In case of Foreign Company has obtained loans from a local vendor / non-recognised financial body not falling within the definition of "Recognised Lender" or alternatively, the Indian company does not fall within the definition of "Recognised Borrower", Whether Borrowing can be continue in Indian Company.

Inbound Merger - In case of the minimum maturity period of Overseas Borrowing are not in alignment with the ECB guidelines? Whether Indian party can renegotiate the maturity period prior to merger or repay the ECB within two years.

In case Inbound Merger - Loan given by Foreign Co to Third party overseas borrower can continue in Indian Company post merger ?

Entry Routes of Investment



What is Foreign Investment? What is FDI? What is FPI?

Foreign Investment

- Investment made by a PROI On a repatriable basis
- In capital instruments of an Unlisted Indian company Or to the capital of an LLP
- Beneficial interest held by PROI shall be foreign investment even though invested by Resident Indian, only upon declaration
- Overall umbrella definition – covers FDI and FPI investment

FDI

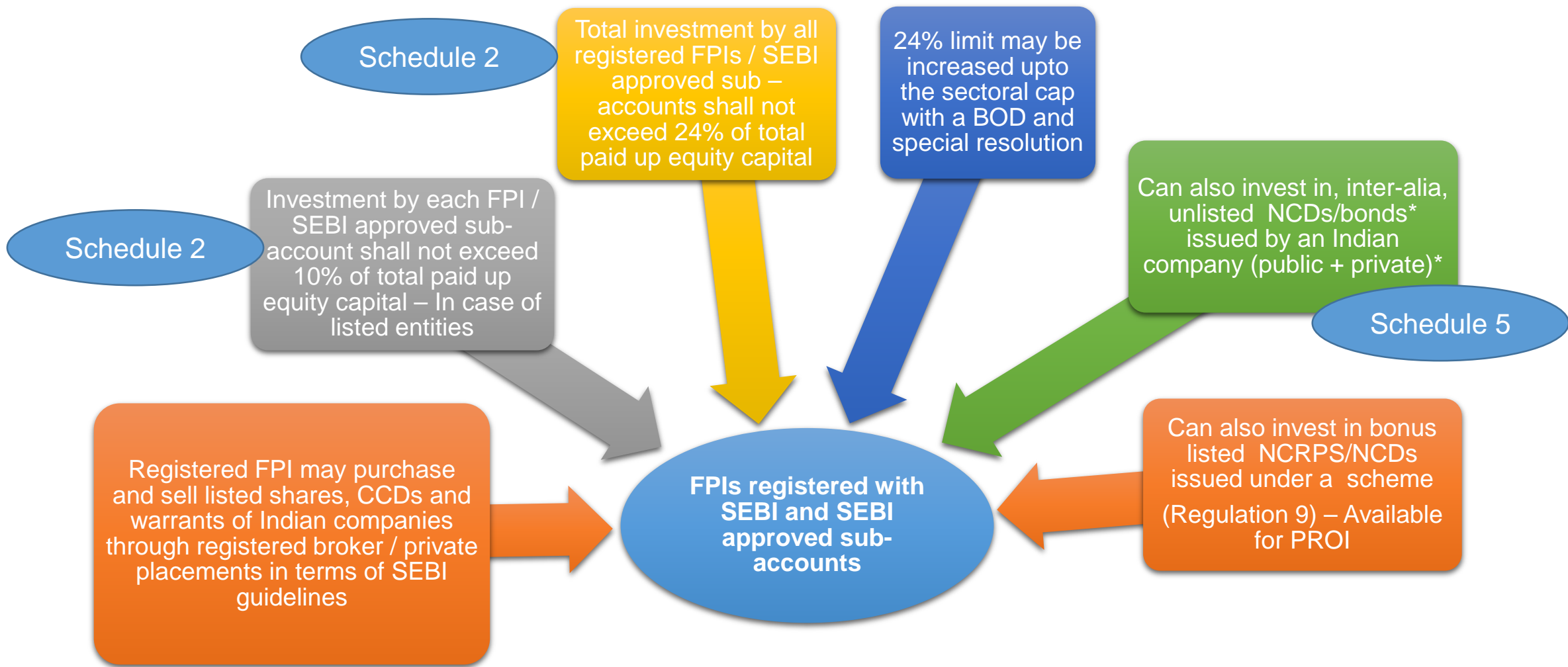
- Investment by a PROI Through capital instruments
- In an unlisted Indian company or
- Equal or more than 10% of the post issue paid up equity capital of a listed Indian company on a fully diluted basis

Foreign Portfolio Investments

- Investment made by any PROI
- In capital instruments of an Indian listed company which is less than 10% of the post issue paid up capital on a fully diluted basis or
- Less than 10% of the paid up value of each series of capital instruments of a listed Indian company
- 10% limit applicable to each foreign portfolio investor

A listed Indian Company is an Indian company which has any of its capital instruments listed on a recognised stock exchange

Investment by FPIs under Schedule 2 and Schedule 5



* RBI/2016-17/138 dated 17 Nov 2016. Corresponding permission also given by SEBI Circular 28 Feb 2017

FDI/ FPI in List Co - on a fully diluted basis - Some Examples

Type of capital	Scenario 1	Scenario 2	Scenario 3	Scenario 4
Equity (including foreign Investment)	1,00,000	1,00,000	1,00,000	1,00,000
CCDS/CCPS	70,000	70,000	70,000	-
RPS/NCD	-	1,00,000	1,00,000	-
OCD/OCRPS	-	-	1,00,000	-
Total Capital on fully diluted basis	1,70,000	1,70,000	2,70,000	1,00,000
Equity component of Foreign investment	10,000	25,000	25,000	11,000
Subsequent Sale of Shares by NR	-	-	-	5,000
% FDI/ FPI				

FDI in unlisted Indian company

Any foreign investment (irrespective of limits) would be considered as FDI ?

Whether an unlisted Indian company which has NCRPS/NCD listed on a stock exchange would be considered as a listed Indian company ? If yes, then, whether the 10% limit would be applicable?

'Listed Indian Company' means an Indian company which has any of its capital instruments listed on a recognized stock exchange in India and the expression 'Unlisted Indian Company' shall be construed accordingly

Capital Instruments' means equity shares, debentures, preference shares and share warrants issued by an Indian company;

Explanation:

- (a) Equity shares issued in accordance with the provisions of the Companies Act, 2013 shall include equity shares that have been partly paid. **The expression 'Debentures' means fully, compulsorily and mandatorily convertible debentures.***
- (b) 'Preference shares' means fully, compulsorily and mandatorily convertible preference shares. Share Warrants are those issued by an Indian Company in accordance with the Regulations issued by the Securities and Exchange Board of India. Capital instruments can contain an optionality clause subject to a minimum lock-in period of one year or as prescribed for the specific sector, whichever is higher, but without any option or right to exit at an assured price.*

Procedural guidelines



Receive share application money

- Inward remittance through normal banking channels or Debit to NRE/FCNR account
- Non monetary consideration – as discussed earlier



Report receipt of share application money

- Indian investee Co to file Advance Reporting Form within 30 days of receipt
- Online filing on e-biz portal / SMF form
- FIRC and KYC report to be attached



Issue Shares

- Shares to be issued within 60 days - Else refund amount within 15 days from date of completion of 60 days
- Refund beyond 15 days- seek prior RBI approval



Report Issue of shares

- Indian Co to file Form FC- GPR within 30 days of allotment
- Online filing on e-biz portal / SMF form
- CA and CS certificate to be attached



Annual Filing

- Annual Return on Foreign Liabilities and Assets by July 15 every year
- Return to be filed even if no fresh investment received during the year

Mode of Investment and Permitted Securities



Modes of Investment

Monetary Investment

1. Share Subscription
2. Purchase by way of transfer from resident/ non-resident shareholders
3. Rights Shares
4. ESOPs & Sweat Equity Shares

Non monetary investment (under Automatic route)

1. Swap of shares for sectors under automatic route
2. Amounts payable to the foreign investor, remittance of which is permitted or which does not require prior approval
3. Import of capital goods/ machinery/ equipment (excluding second hand)
4. Pre-operative/ pre-incorporation expenses incurred by the foreign promoter for WOS up to lesser of 5% of authorized capital or USD 500,000

Non monetary investment (permitted with prior Government / RBI approval)

1. Gift from R to NR (should not exceed 5% of the authorised capital or USD 50,000 during the FY)
2. Swap of shares for sectors under Government approval route
3. Import of second-hand machinery

Permissible securities

'Capital instruments' including equity shares (including partly paid shares) and **Share warrants (FEMA 2017)**, compulsorily convertible preference shares (CCPS), compulsorily convertible debentures (CCD) and share warrants

Funding Instruments	FEMA	Income Tax
Equity Shares	Equity	Equity
Compulsory Convertible Preference Shares ('CCPS')	Equity	Equity
Compulsory Convertible Debentures (CCDs)	Equity	Debt
OCPS/ Partially Convertible Preference Shares	Debt	Equity
OCD/ Partially Convertible Debentures	Debt	Debt

Share warrants-

Share warrants are those issued by an Indian company in accordance with SEBI regulations

At least 25% of consideration to be received upfront and the balance within 18 months of issue

Partly paid shares issued to PROI-

25% of the total consideration (including share premium) to be received upfront. Shares to be fully called-up within 12 months of issue

Whether payment of interest for delay in refund requires RBI approval?

Whether Share warrants can be issued by unlisted Indian Company ?

Optionality clauses for Equity, CCPS and CCDs

Whether amendment in terms of CCPS / CCD require prior RBI approval -

Whether interest on CCD subject to any ceiling –

Ceiling limit on Dividend on CCPS removed (FEMA 2017)

Optionally and / or Non-convertible Preference Shares treated as External Commercial Borrowings (ECB)

Optionality clauses for Equity, CCPS and CCDs (Circular dated January 9, 2014)

- Minimum lock-in period of one year or that prescribed under specific sector, whichever is higher
- Option / right to exit to be without any assured return
 - Exit for Shares / CCDs of Listed Company - Ruling market price / stock exchange for listed company;
 - Exit for equity shares of unlisted company based on internationally accepted pricing methodology

Q – Whether non-resident can exit at an assured price?

Pricing of capital instruments



Pricing of capital instruments for NR investor

Pricing guidelines applicable both at the time of investment as well exit

1

Subscribing to MoA/AoA by PROI

- Equity investment can be made at face value

2

Further infusion in Unlisted Company

- => price as per internationally accepted pricing methodology for valuation of shares on arms' length basis, certified by CA/MB/cost accountant

3

Share warrants

- Pricing and price/conversion formula to be determined upfront at the time of issue.

4

Investment in convertible instruments (CCPS,CCDs)

- Price/conversion formula to be determined upfront at the time of issue.
- Price at the time of conversion cannot be lower than fair value worked out at the time of issue

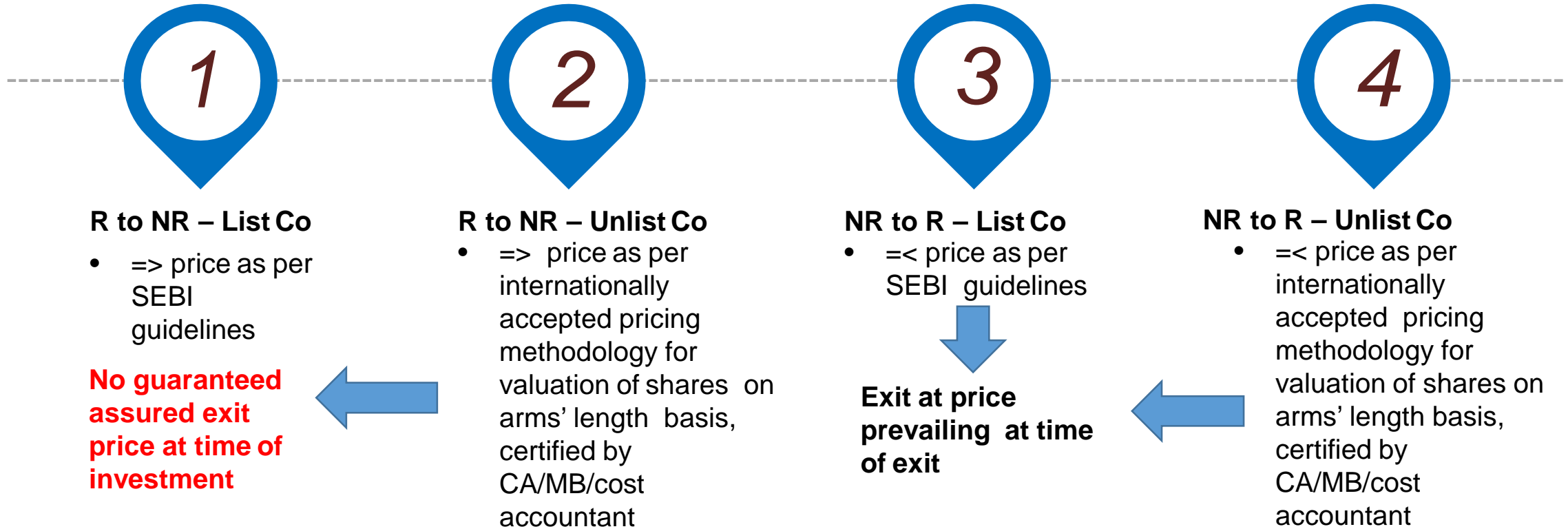
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Swap of instruments

- Valuation to be undertaken from SEBI Merchant Banker

Whether pricing guidelines will be applicable in case of investment in capital instrument by NRI on Non-Repatriation basis ?

Pricing guidelines for transfer of capital instruments (Reg. 11)



Pricing norms not applicable to inter se transfer between two non-residents

Transfer of capital instruments - automatic/approval? (Reg. 10)

Particulars	Nature of transfer	Automatic Route	Approval Route	Pricing guidelines
NR to NR	Sale	Yes	Not required if sectors under automatic route	Not Applicable
	Gift	Yes		
NRI (Non Repatriable) to NRI (Non Repatriable)	Gift / Sale	Yes	-	Not Applicable
R / NRI (Non Repatriable) to NR (FEMA 2017)	Sale	Yes	Not required if sectors under automatic route and eligible buyer	Applicable
R / NRI (Non Repatriable) to NR	Gift	No	Approval required subject to conditions	Not Applicable
NR to R	Gift	Yes	-	Not Applicable
	Sale	Yes	-	Applicable
Acquisition of shares by NR (including NRI)	Purchase on SEs	Yes, subject to certain conditions	-	Applicable

Transfer of capital instruments in the financial sector from R to NR – approval required ?

Reporting transfer of shares

FCTRS - Form Foreign Currency-Transfer of Shares

Transfer of capital instruments **by way of sale** between the following to be reported in Form FC-TRS:

1. **NR (on repatriable basis) and NRI (on non-repatriable basis)** or vice versa
2. NR (on repatriable basis) and Person Resident in India or vice versa
3. Transfer of capital instruments in case of deferred consideration cases
4. **Transfer of capital instrument on recognised stock exchange by NR**
5. Transfer of participating interest/ rights in oil fields

In case of transfer of shares between NR (Non repatriation basis) and R - Form FCTRS is required to be filed ?

Whether FCTRS required in case for transfer of shares by way of gift ?

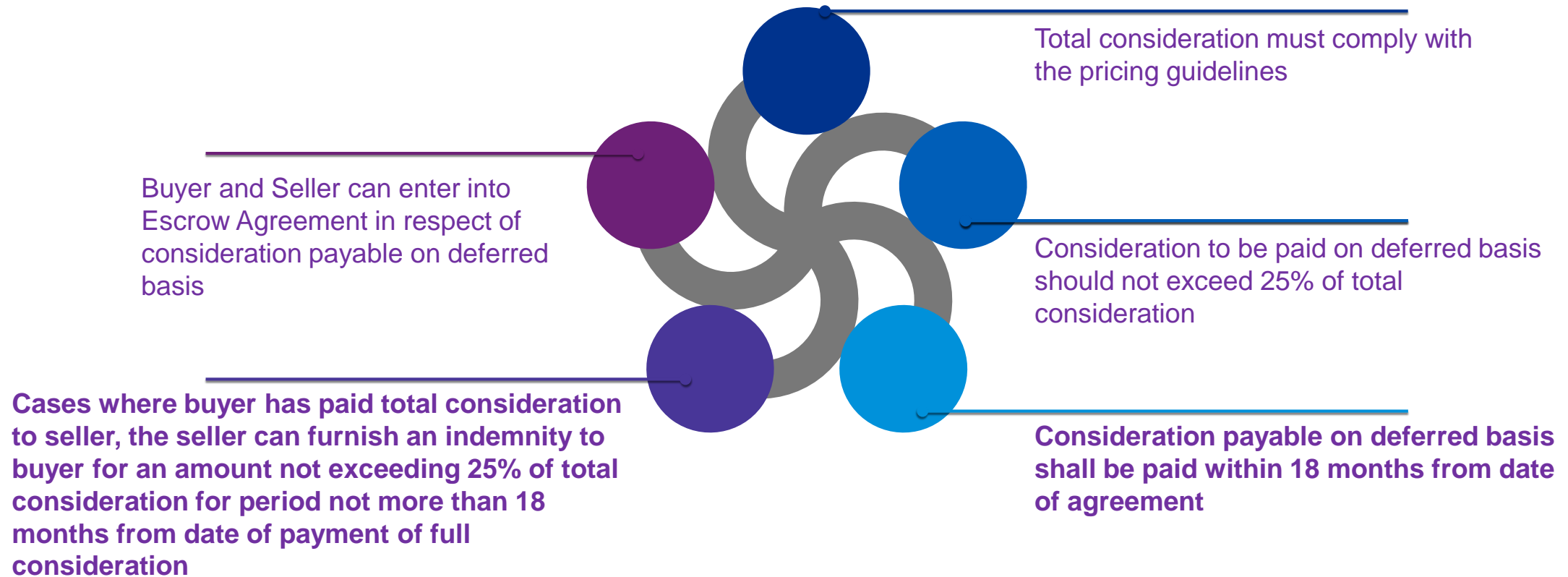
Onus of reporting on resident transferor/ transferee or NRI (holding instruments on non- repatriable basis)

Onus of reporting on person resident outside India if transfer of capital instrument on stock exchange

Time period of filing FC-TRS with AD-Bank is within 60 days of transfer of capital instruments or receipt/ remittance of funds whichever is earlier

Deferred Consideration

Discharge of consideration for transfer of shares between resident buyer and non-resident seller or vice versa now permitted on deferred basis subject to certain conditions



Indirect Foreign Investment



Direct and Indirect FDI



Total Foreign Investment ('FI') = Direct FI + Indirect FI



Direct Foreign Investment

Indirect Foreign Investment

Foreign Co.

Foreign Co.



Direct FI

I Co1

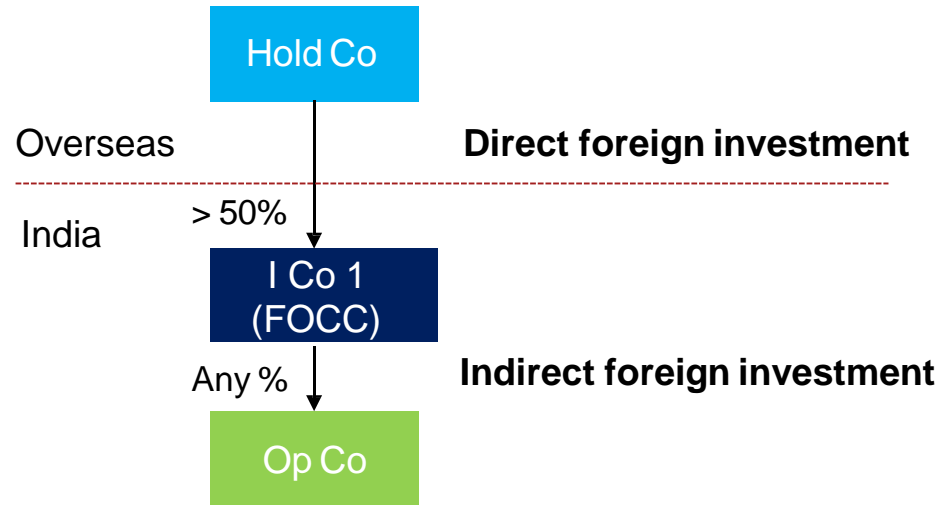
I Co1

Indirect FI

I Co2

Maybe a cascading investment i.e. through a multi-layered structure

Concept of indirect foreign investment



Indirect foreign investment means downstream investment received by an Indian entity from an FOCC

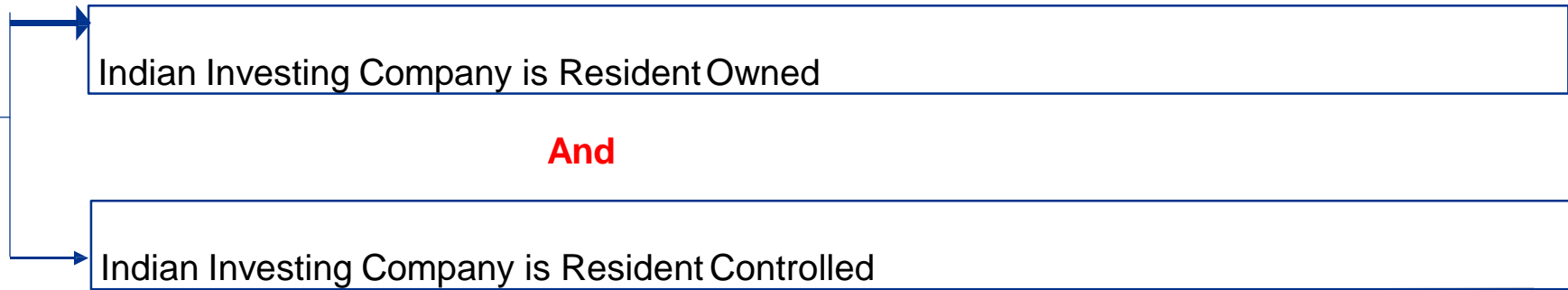
Criteria for being an FOCC

- > 50% capital instruments beneficially owned by PROI / contribution of more than 50% in capital of LLP and having majority profit share (**Ownership test**)

OR

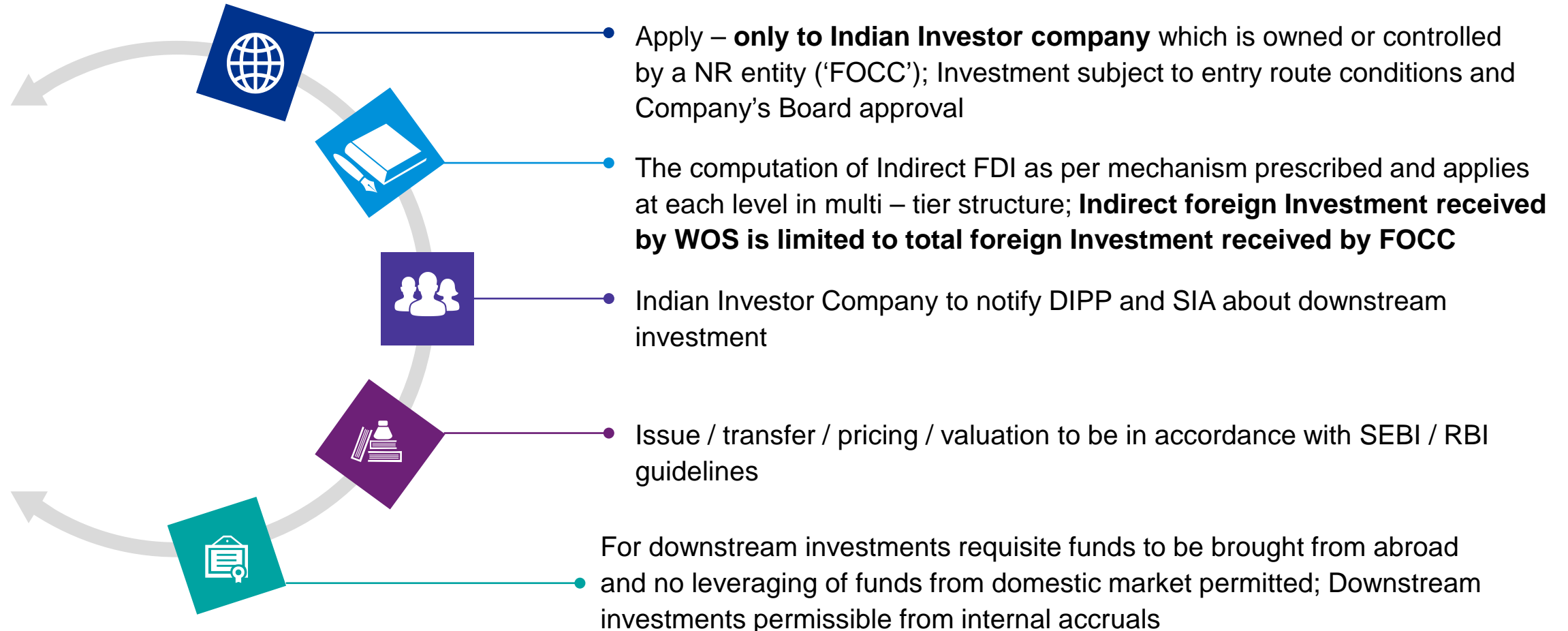
- Company is controlled by PROI (**Control test**)
 - The **right to appoint a majority of the directors or to control** the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements
 - **LLP** : right to appoint majority of designated partners, where such designated partners, with specific exclusion to others, have control over all policies of LLP

Downstream investment through Indian Co not to be considered as Indirect Foreign Investment



Downstream Investments

An Indian Company said to have indirect foreign investment if the investing Indian company has foreign investment in it



Consequences of investment received being treated as indirect foreign investment



Indirect foreign investment received to be treated as foreign investment for computing the % of foreign investment while checking compliance with sectoral caps



Pricing guidelines to apply to the indirect foreign investment and Reporting requirements to be fulfilled and Such compliance to be mentioned in the Director's Report

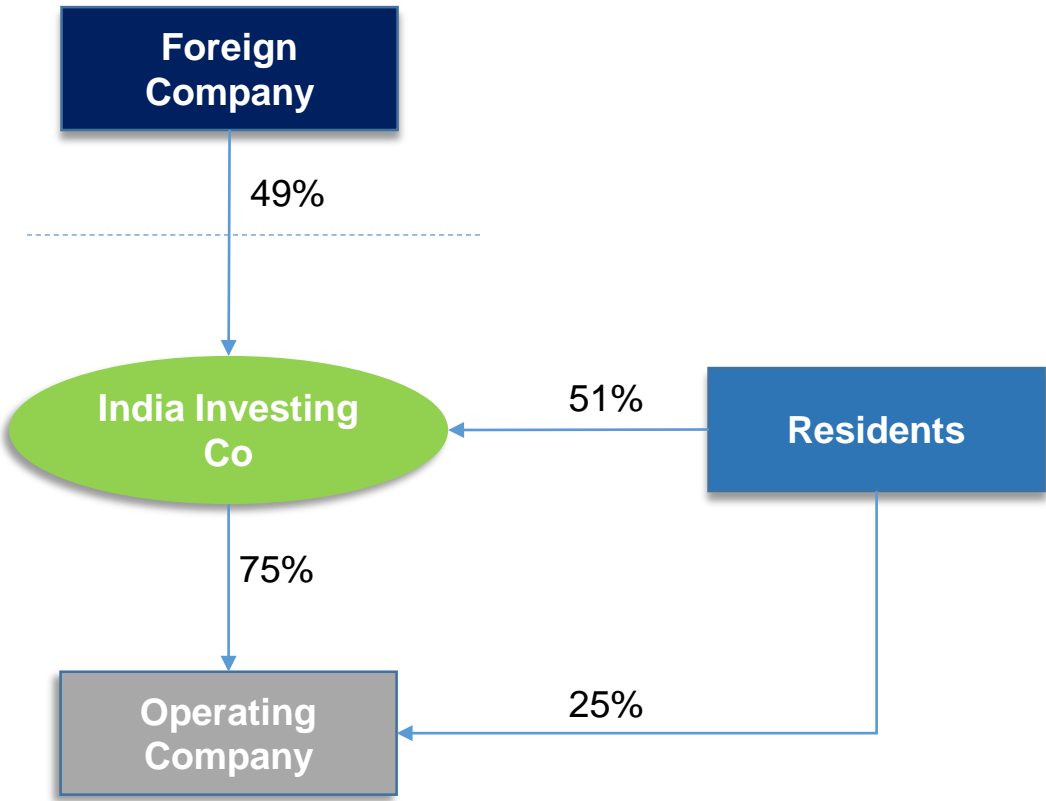
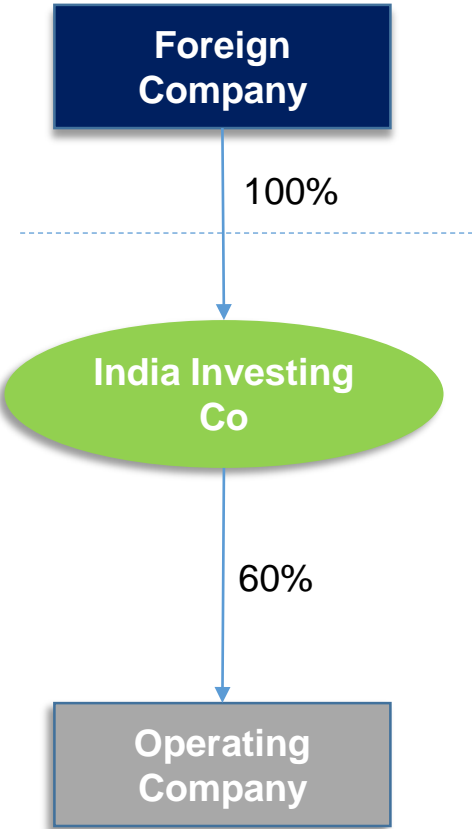


Indian entity making downstream investment responsible for ensuring compliance with the regulations

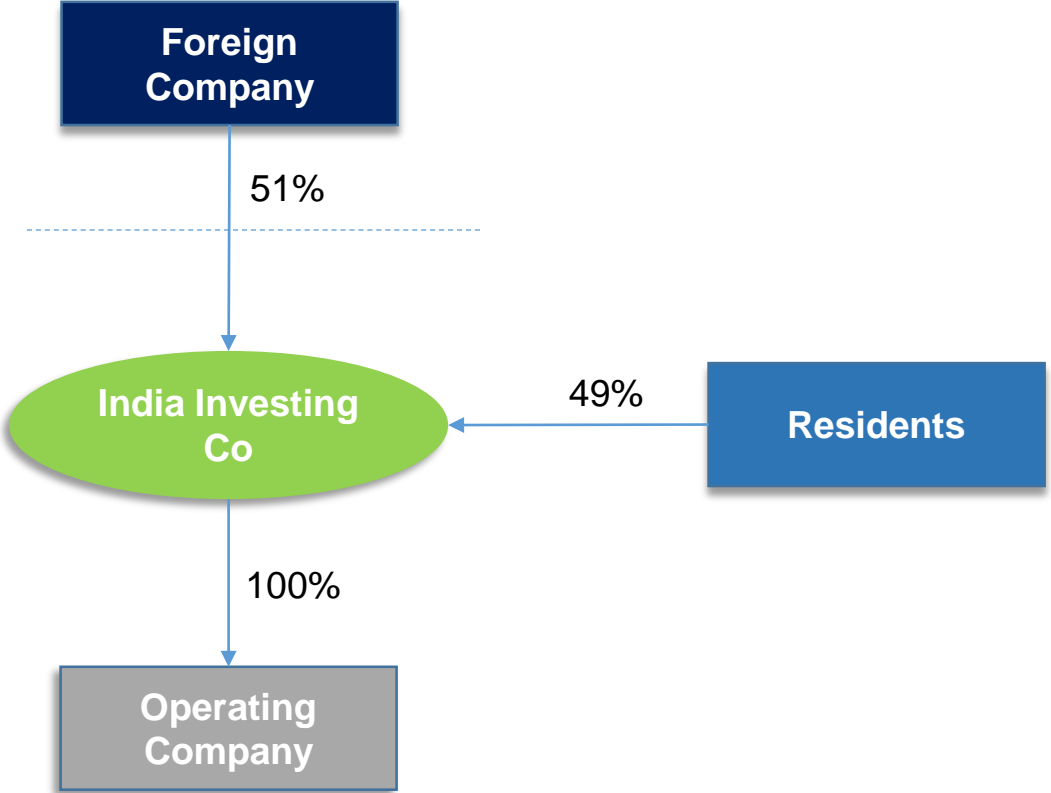
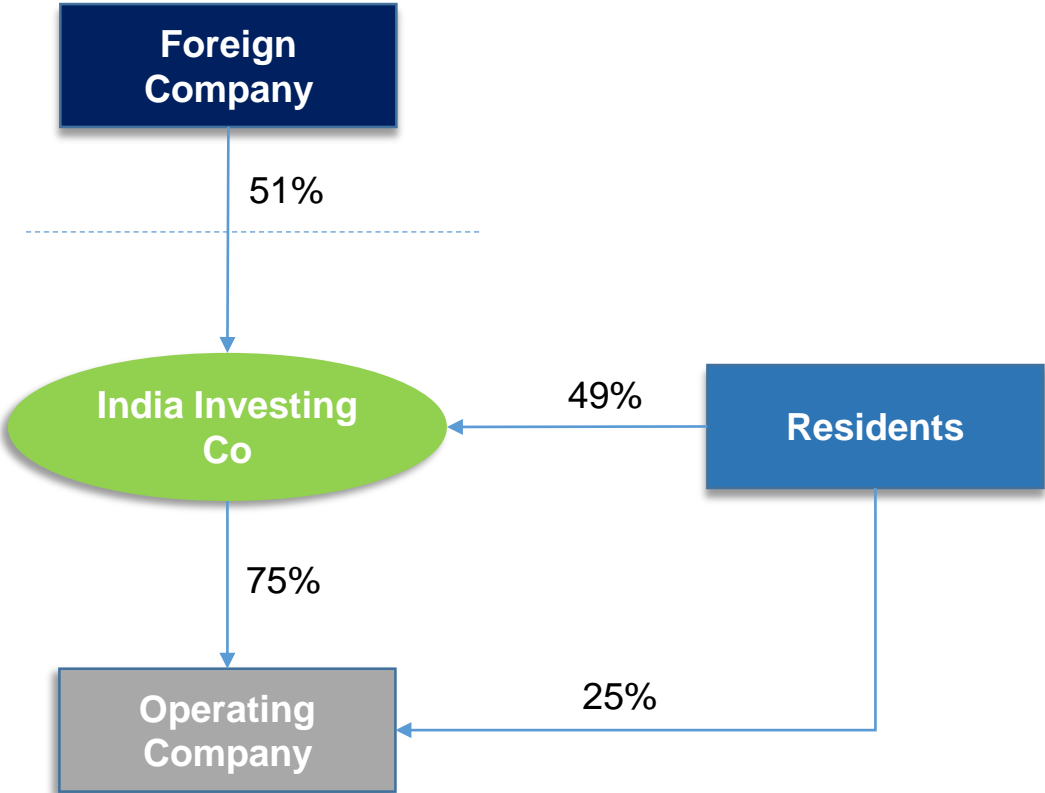


Such entity to obtain annual certificate from statutory auditor certifying compliance with regulations

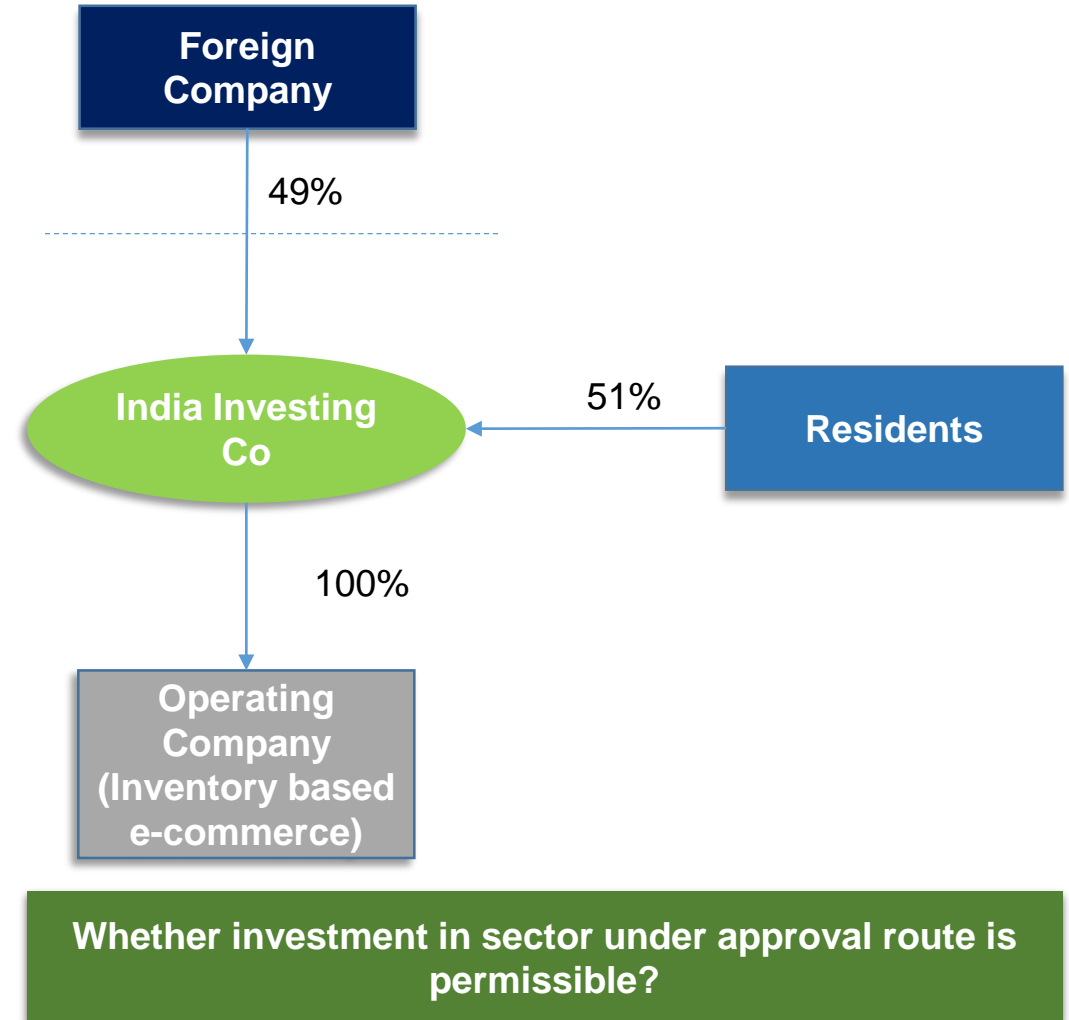
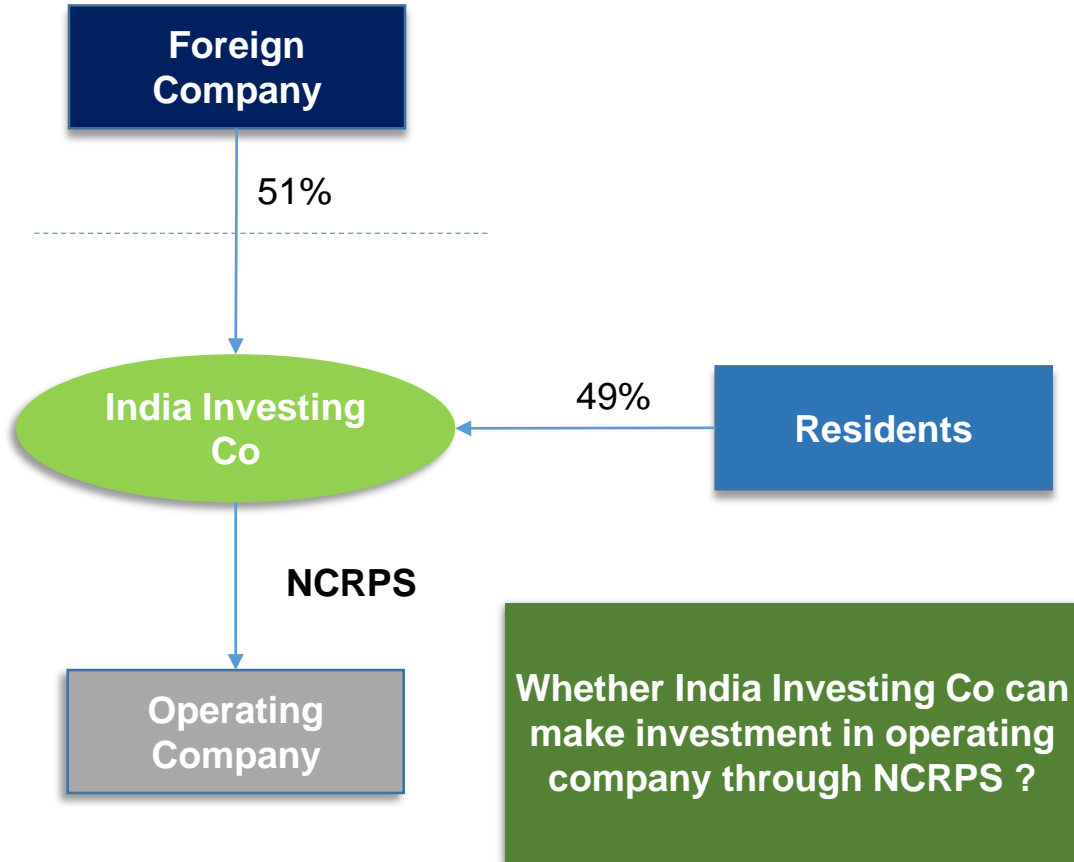
Downstream Investment Calculation



Downstream Investment Calculation



Downstream Investment - Permissible Instrument



Conditions for FOCC making downstream investment

For making downstream investment, I Co shall bring funds from abroad and not borrow funds from domestic markets

Downstream investment can be made through internal accruals (profits transferred to reserves after payment of taxes)

Can issuing RPS to an Indian company be considered as local borrowings / Domestic markets?

Whether FOCC Company can take domestic borrowing to acquire the business from Third party on slump sale basis ?

Summary of Downstream Investment

Sector	Op Co cum Investment Co (FOCC)	Op Co cum Investment Co (IOCC)
Automatic Route	Permissible	Permissible
Government Route	Approval required	Permissible
Prohibited Sector	Prohibited	Should be permissible?

Transferor	Transferee	Pricing Applicable	Reporting requirement
FOCC (NR)	NR	No Pricing guidelines	Form FCTRS required to be filed
FOCC (NR)	R	Subject to pricing guidelines	Form FCTRS required to be filed
FOCC	FOCC	No Pricing guidelines	Not Required

Thank you

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Annexures

Sectoral Caps

Automatic Route (Illustrative)

- Manufacturing sector
- Cash and Carry Wholesale
- Trading – 100%
- Single brand retailing E-Commerce – 100%
- Pharmaceutical (Greenfield projects) – 100%
- Pharmaceutical (Brownfield projects) – up to 74%
- Construction Development – 100%
- Insurance – 49%
- Pension – 49%
- Banking Private Sector – up to 49%



Prior Approval (Illustrative)

- Multi brand retailing – 51%
- Pharmaceutical (Brownfield projects) – beyond 74% and up to 100%
- Defence – beyond 49% and up to 100%
- Civil Aviation - Scheduled Air Transport Services/Domestic Scheduled Passenger Airline - beyond 49% and up to 100%
- Telecom Sector - beyond 49% and up to 100%



Negative List (Illustrative)

- Lottery, betting and gambling
- Chit fund, Nidhi company
- Trading in Transferable Development Rights
- Real Estate Business* or Construction of Farm Houses
- Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes
- Atomic energy, railway operations



Note: (a) Sector specific guidelines
(b) Subject to certain exceptions

*Real estate business does not include development of townships, construction of residential/commercial premises, roads or bridges, Real Estate Investment Trusts registered and regulated by SEBI and real-estate broking services.

Rights issue (Reg. 6)



Pricing of rights issue for PROI

- **Listed company** – At the price determined by List Co.
- **Unlisted company** – At a price not less than price offered to resident shareholders



Key 2017 amendment

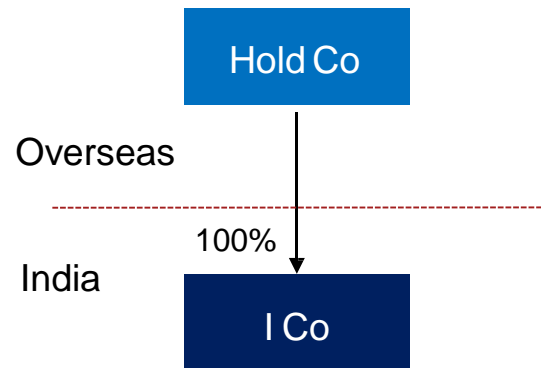
- Exercising right option by NRI, issued when he was a resident – new shares to be held on non-repat basis
- Right shares can be renounced in favour of a PROI by a R/PROI - **all conditions of rights issue to apply to such shares**

Other conditions for Rights Issue /Bonus Issue

- In compliance with the provisions of the Companies Act, 2013 and FEMA Regulations
- Issue shall not result in a breach of the sectoral cap applicable
- Consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B) account

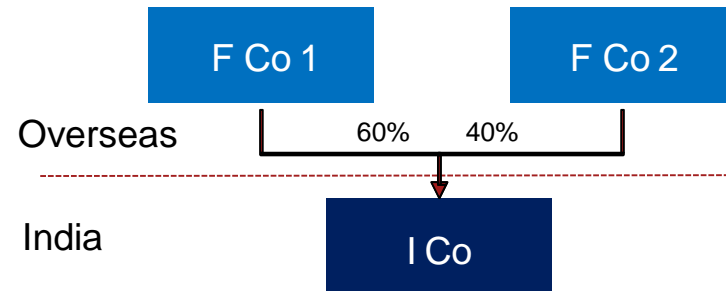
Capital instruments other than share warrants can be issued as a Rights Issue.

Rights issue (Reg. 6)



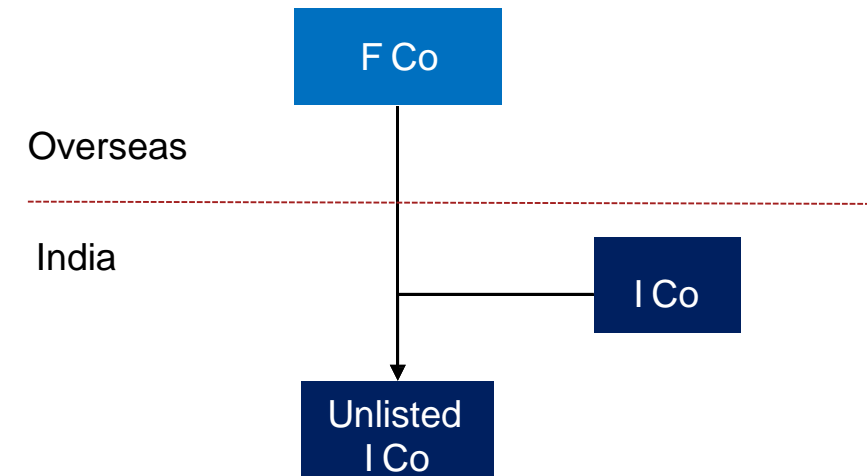
Rights issue by an Indian WOS.

- Can it be considered as a rights issue?
- Issue price – as determined by the Co or fair value?



All shareholders are non- residents.

Issue price – as determined by the Co or fair value?



- I Co announces rights issue at Rs.120/share. Fair value as per IAPM is Rs.270/share
- Only F Co participates in rights issue; stake of F Co increases

Whether approval required for increase in stake by F Co at less than fair value?

Issue of bonus NCRPS/NCDs to non-residents (Regulation 9(2))

Issue of bonus NCRPS/NCDs to non-residents:

- Possible, under an NCLT approved scheme of arrangement, in accordance with Companies Act, 2013
- Bonus issue out of general reserves;
- Original investment should be made in accordance with the Regulations;
- The Indian company should not operate in a prohibited sector

The requirement of obtaining NOC from tax authorities now deleted in the FEMA 2017 amendment

FDI in LLP's

FDI allowed in LLP:

- Allowed in open sectors where 100% FDI is permitted under the automatic route with no FDI linked performance conditions
- Downstream investments allowed by Indian Companies in LLPs if the Indian company and the LLP both are operating in sector where 100% FDI is permitted under the automatic route with no FDI linked performance conditions.

Downstream Investment by LLP not permitted in sectors with FDI linked performance conditions

Divestment proceeds may be remitted out of India

LLP with FDI shall not be allowed to operate in prohibited activities agricultural/plantation activity, print media or real estate business

Conversion of LLP into Company or a Company into LLP allowed in case of 100% automatic route and no FDI linked performance conditions

Investments in LLPs by FPI / FVCI not permitted

Whether FDI in LLP operating in other sectors permissible under Approval route?

No – LLP engaged in following sectors are prohibited from accepting FDI

- Sectors eligible to accept 100% FDI under automatic route but subject to FDI-linked performance conditions (**such as Construction Development, Industrial Park, Wholesale cash and carry, etc.**)
- Sectors eligible for less than 100% FDI (Banking, Insurance, etc.)
- Sectors eligible for FDI under Government route (Satellite, FM Radio, Public Sector Bank, etc.)
- Agriculture/ plantation activity and print media;
- Sectors prohibited for FDI (Lottery Business including Government/private lottery, online lotteries, etc., Gambling and Betting including casinos etc., Chit funds, Nidhi company, Trading in Transferable Development Rights (TDRs), Real Estate Business or Construction of Farm Houses)

Permitted mode of Investment

- By way of capital contribution
- By way of acquisition/ transfer of profit shares
- Investment by way of 'profit share' will fall under the category of re-investment of earnings

Mode of payment

- Payment towards capital contribution of LLPs shall be made by way of inward remittance through normal banking channels or by way of debit to NRE/ FCNR (B) account

Downstream Investment

- Permitted in company or LLP engaged in sectors in which 100 per cent FDI is allowed under the automatic route and there are no FDI linked performance conditions