

FEMA Foreign Inbound Investments (i.e. Foreign Direct Investment/FPI)

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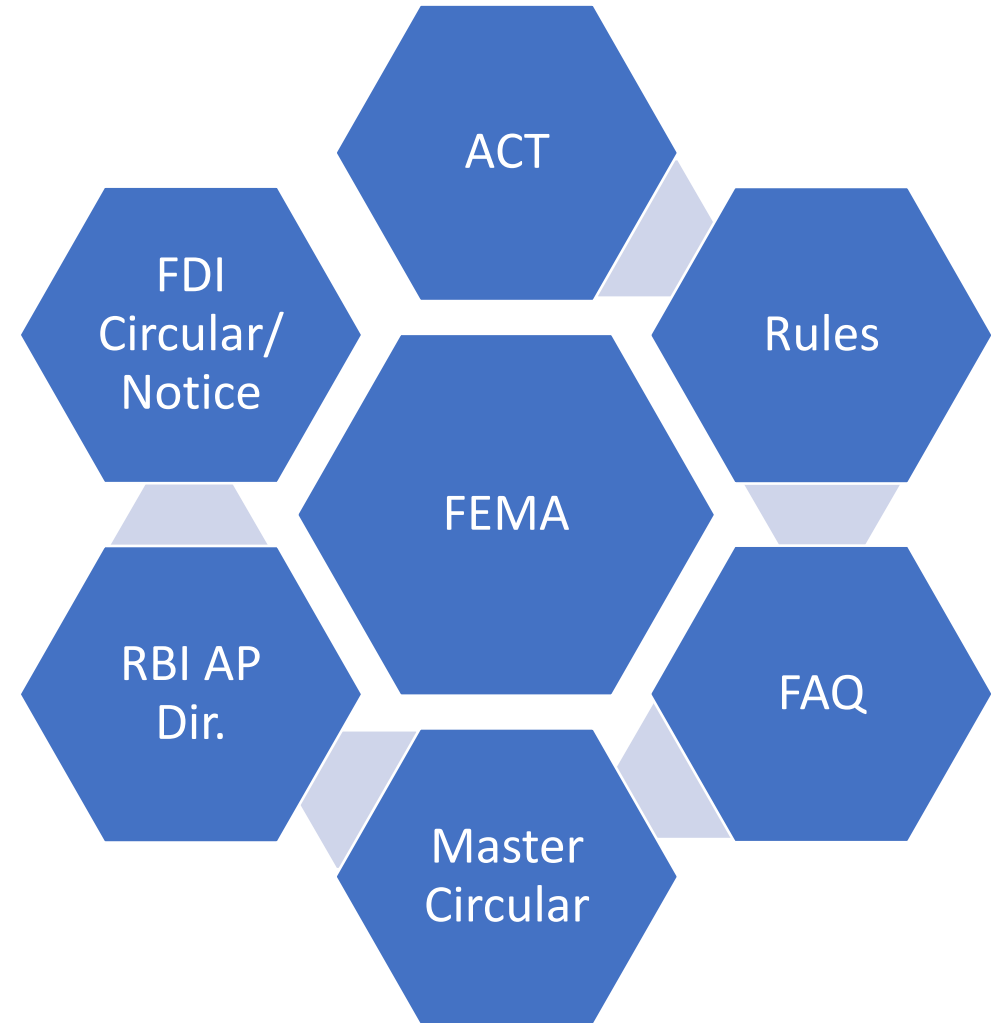
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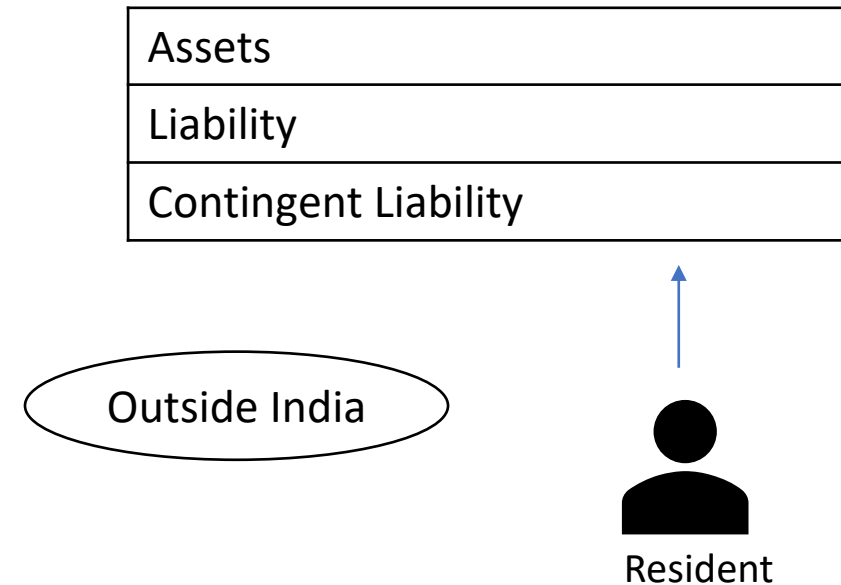
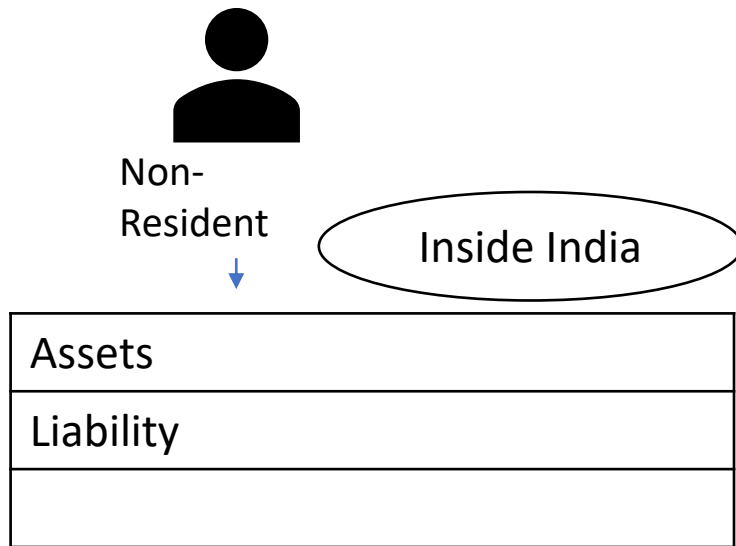
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Foreign Direct Investment – Core Principles

- General FEMA principles on capital account transactions vs current account transactions
- Equity investments and debt investments
- Investment Routes Automatic and Government / Approval.
- Sectoral Restrictions Prohibited sectors, sectoral caps and conditions.
- Pricing guidelines --“Fair Value”



Capital Account Transactions



- Generally prohibited unless expressly permitted
- Governed by FEM (Permissible Capital Account Transactions) Regulations, 2000

Current Account Transactions

Defined to mean any transaction **other than capital account transaction**

- Generally permitted unless expressly prohibited
- Governed by FEM (Current Account Transactions) Rules, 2000

Overview of foreign investment routes in India

FDI	FDI	FPI	ECB	FVCI	Other
<ul style="list-style-type: none"> • Company-Equity shares /CCPS / CCDs /Warrants • LLPs • Listed equity shares (>10% stake) 	<ul style="list-style-type: none"> • AIF • ReIVT • Invit 	<ul style="list-style-type: none"> • Listed & unlisted Con.Debenture • Equity oriented mutual funds • G Sec, etc. • Total Individua 10% and aggregate 24% 	<ul style="list-style-type: none"> • Loans • Securitized Instruments • FCCBs • Foreign Currency Exchangeable Bonds 	<ul style="list-style-type: none"> • Equity shares • CCPS/ OCRPS/ • NCDs • CCDs / OCDs /NCDs • Warrants 	<ul style="list-style-type: none"> • NRIs portfolio and others • DRs • Start up • convertible notes

Automatic Route

Does not require prior approval of RBI or Central Government.
 •E.g., Insurance (Sectoral cap 74%, Route Automatic)

Approval Route

•Requires prior approval of Government.
 •E.g. Private Sector Banking (Upto49%,Route–Automatic) (>49% and <74%, Route–Approval)

Prohibited Sectors

- | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> • Lottery business • Chit Funds • Trading in TDR • Gambling and Betting | <ul style="list-style-type: none"> • Nidhi Company • Real estate business (except REITs) or construction of farmhouses • Mfg. of cigars, cheroots, etc. of tobacco or tobacco substitutes • Sectors not open to Private sect or investment(e.g. Atomic energy) • Foreign technology collaborations for lottery/gambling/betting |
|------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Recent amendment - Approval route applicable for FDI from the countries sharing border with India

FDI - Equity Instruments



Partly paid shares

- 25% of total consideration upfront
- Balance consideration within 12 months



Share warrants

- 25% of total consideration upfront
- Balance consideration within 18 months

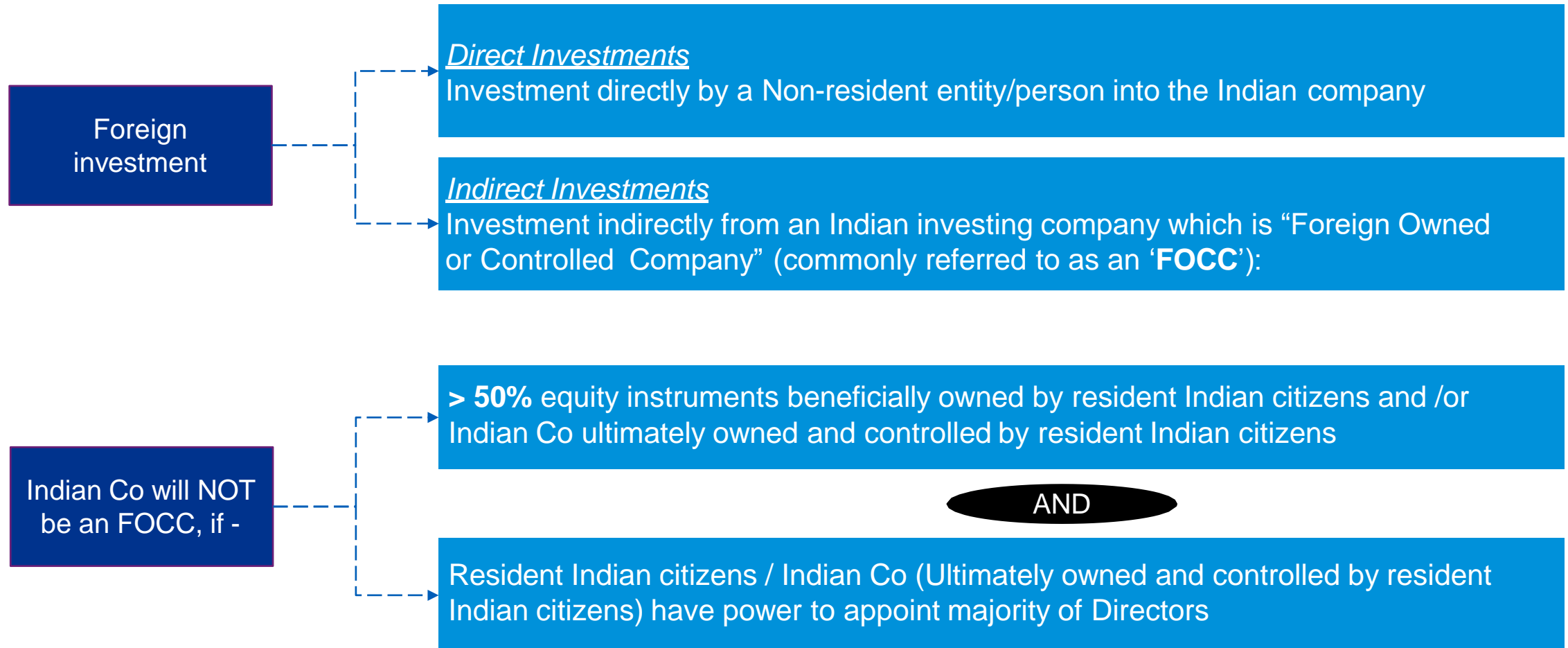
Instruments can have call / put options provided no assured return guaranteed – 1 year lock in

Permissible modes for transfer of shares:

1. Sale
2. Gift
3. Transfer pursuant to: Liquidation, M&A
4. Sale on recognized stock exchange

NR – NR
NR - R
R – NR






Direct and Indirect Foreign Investment



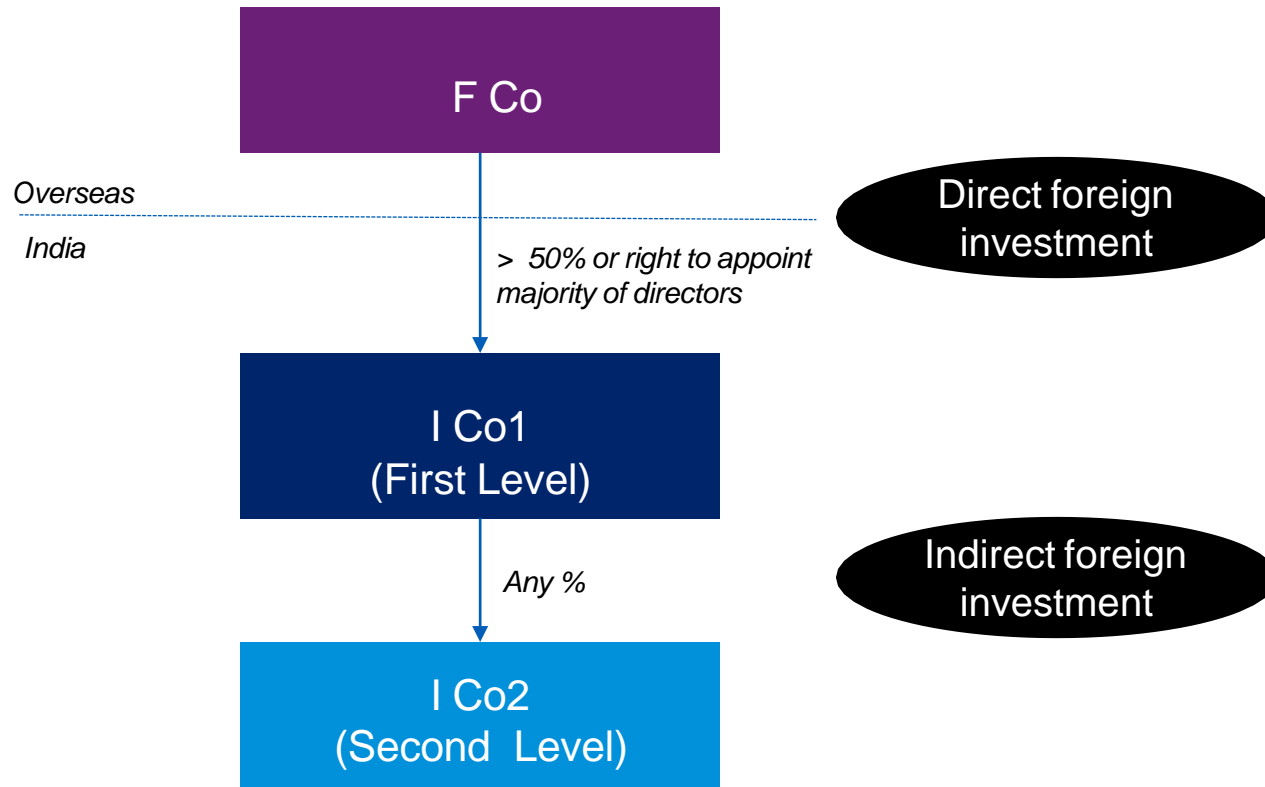
For computation of indirect foreign investment, foreign investment in Indian company to include all types of foreign investments i.e., FDI; investment by FPIs (holding as on March 31); NRIs; ADRs; GDRs; FCCB; CCPS and CCD

Pricing guidelines for Transfer of Securities

Particulars	Listed securities	Unlisted securities
Issue / Transfer of Shares <ul style="list-style-type: none"> R to NR – not less than Fair Value NR to R – not more than Fair Value 	Fair valuation on the basis of SEBI guidelines	Fair valuation as per internationally accepted pricing method on Arms Length Basis
Right issue	Price to be determined by the Company	At price offered to resident shareholders

-  Valuation to be certified by SEBI registered Merchant Banker in case of listed company and CA or SEBI registered Merchant Banker or practicing cost accountant in case of unlisted company
-  Subscription to memorandum can be at face value
-  Pricing guidelines applicable at the time of investment as well as exit
-  Pricing guidelines NOT applicable for transaction between NR to NR
-  Price / conversion formula of CCPS / CCDs to be determined upfront, price at the time of conversion should not be less than the fair value worked out at the time of issue of these instruments

Downstream Investment



Key Conditions:

- No domestic borrowing
- To check at every stage of investment
- Total indirect foreign investment received by a WOS of Indian parent limited to foreign investment received by its Indian parent
- Onus of compliance on first level company making downstream investment

Key Issues:

- Domestic borrowing for acquisition of business ?
- Applicability to loan, OCDs, OCRPS ?
- 51:49 structures ?

Investing through an FPI (Erstwhile FII & Sub-account)

- Role of Designated Depository Participants.
- Types of categories of FPI- Category I & Category II.
- Investments by non-resident Indians and control by non-resident Indians.
- Offshore derivative instruments – erstwhile participatory notes or P Notes.
- Sectoral limits & clubbing of instruments.
- Compliance officer.
- Debt investment vs Equity investment.

Investing through an FVCI

- Prior registration with SEBI is mandatory - combined SEBI and RBI approval.
- Equity linked instruments – departure from FDI.
- Venture capital fund & venture capital undertaking.
- Investment terms and conditions.
- Pricing of instruments is at mutually agreed terms, pricing guidelines not applicable.
- Relaxation in lock-in requirements – The lock-in of pre-IPO securities held by FVCI and AIF reduced to 6 months from the date of their acquisition instead of 1 year. Amendment in the SEBI ICDR Regulations with effect from August 13, 2021.

Investing through an FVCI

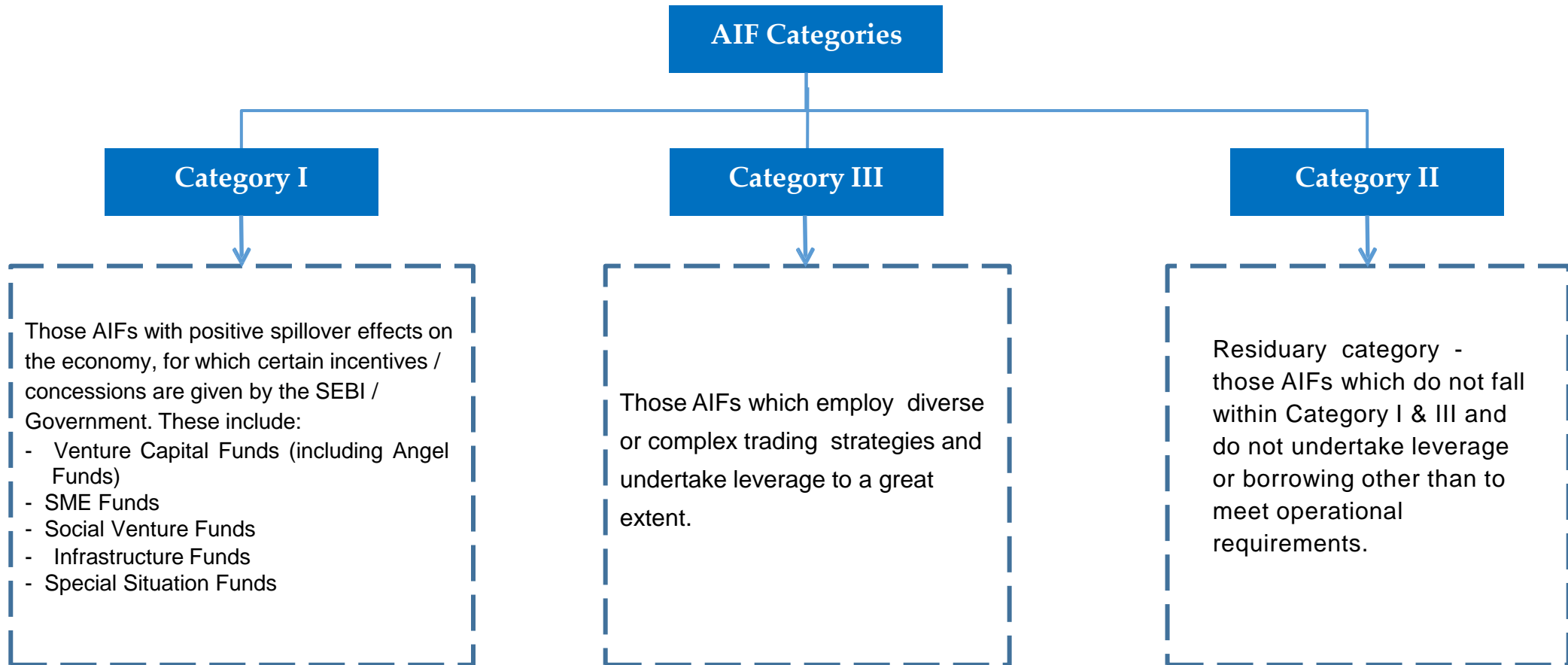
- **FVCIs can invest in the following 10 sectors:**

Biotechnology	Dairy industry
Infrastructure sector	Poultry industry
Nanotechnology	Production of bio-fuels
R&D of new chemical entities in pharma sector	Hotel-cum-convention centres with seating capacity of more than 3,000
Seed research and development	IT related to hardware and software development

- **Negative sectors**

Investing through an Alternative Investment Fund (AIF)

The AIF Regulations categorise funds into 3 categories, based on their investment focus and impact on the economy:



Foreign investments in AIFs, REITs & InvITs

- Automatic route for all investors.
- No pricing guidelines.
- Downstream investment regulations extend to AIFs, REITs & InvITs also.
- Deepening market for fund of funds and secondaries in the funds space.
- Increasing appetite from geographical regions hitherto shying away from Indian Investments - South Korea, Scandinavian countries, South Africa, Australia.
- Increasing trend of domestic fund structures for large international investors – KRR, Brookfield, Blackstone, CPPIB, CDPQ , Macquarie

FEMA Foreign Outbound Investments (i.e. Oversea Direct Investment/OPI)

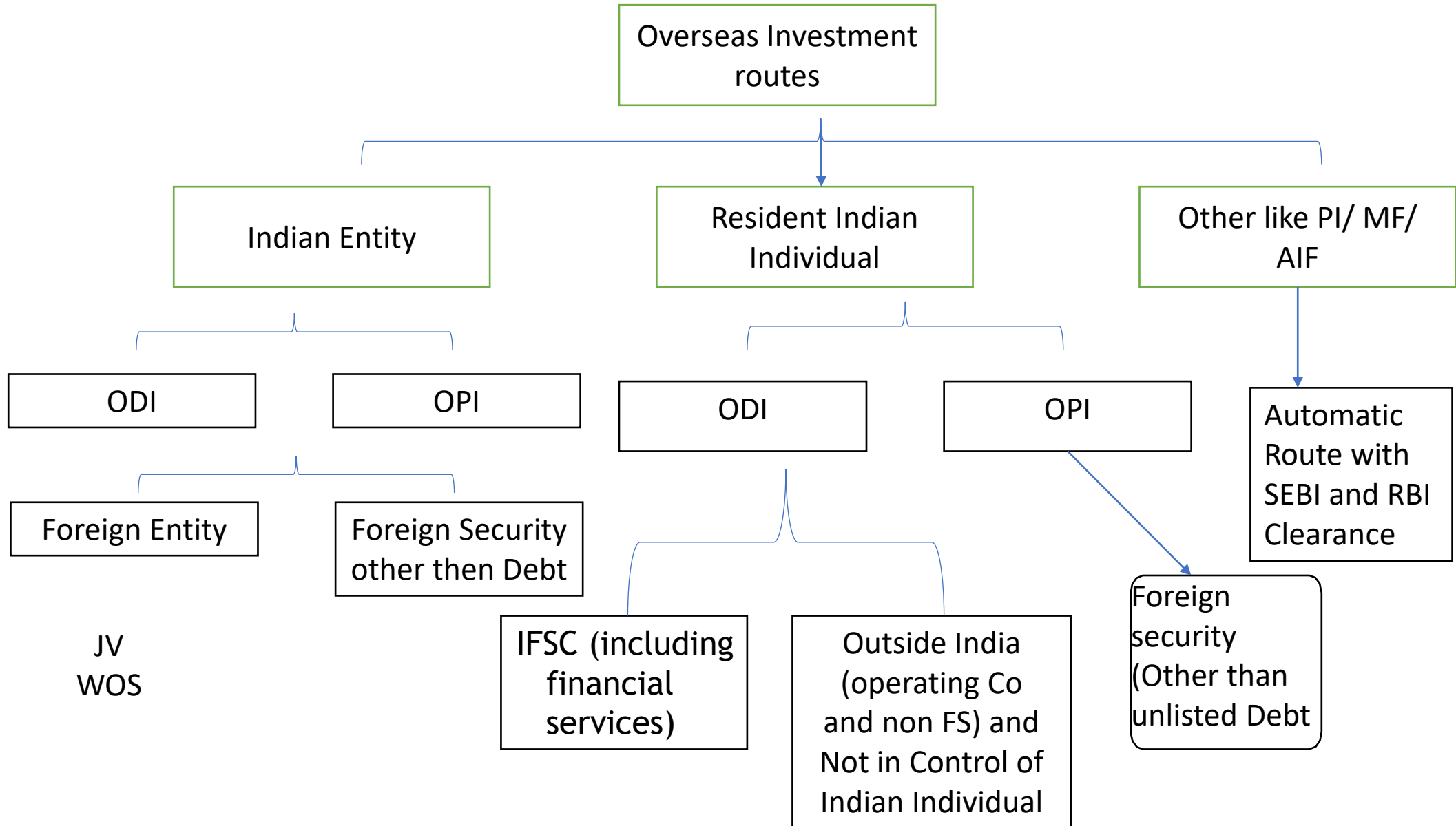
Overseas Direct Investment – Core Principles

Section 6 (3)(a) of the Foreign Exchange Management Act, 1999, (42 of 1999) read with Notification No. FEMA.120/RB-2004 dated July 7, 2004, (GSR 757 (E) dated November 19, 2004), viz. **Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004.**

- FEMA (Overseas Investment) Direction June 2022
- FEMA (Overseas Investment) Regulation August 2022
- FEMA (Overseas Investment) Rules, 2022
- Master Direction on Reporting
- Master Direction on LRS updated
- Master Direction on Immovable Property updated
- Two Route system
- Scrutinized by bankers – AD, RBI, IT – International Tax Cell.
- Not covered by statutory audit – so onus on company and often irreversible

- Liberalization Scheme and Free trade movement under WTO/ WIPPO/
- Recognized as important avenues for promoting global business by Indian entrepreneurs.
- Economic and business co-operation.
- Transfer of technology and skill, sharing of results of R&D, access to wider global market.

Overseas Investment (Either Automatic / Approval)



Direct Investment / Financial Commitment

B1. Automatic Route

ODI	FC
Upto 400% of Net Worth as per last audited balance sheet of the Indian entity (subject to max of USD 1 billion in a year)	Including : <ul style="list-style-type: none">➤ 100% equity shares/CCPS/other preference shares➤ 100% Loans given➤ 100% of guarantees (other than performance guarantees) given to JV/WOS➤ 100% of bank guarantee issued by Indian bank on behalf of JV/WOS of Indian party if backed by counter guarantee of the Indian party➤ 50% of performance guarantees issued by Indian party to or on behalf of overseas JV/WOS
OPI : Upto 50% of Net Worth as per last audited balance sheet of the Indian entity	

B.8 Approval Route (A4)

<ul style="list-style-type: none">➤ ODI more than USD 1 billion.➤ Listed Entity in FS = 50% of NW.➤ Indian MF cap to USD 7 Billion.➤ Real estate business Buying and selling in real estate or Trading in TDR (Excludes development of township; Construction of residential/commercial premises, roads or bridges).➤ Banking Business.➤ Foreign entity + Indian equity cant participate in IDR link Security.➤ FATF.➤ Foreign Unlisted Entity shall hold max 10% of the net asset value of Indian Entity.

Pricing/ Valuation before Investment

- If subscribing to the MOA – at par
- If by way of partial or full acquisition of an existing foreign company where investment in
 - more than 5 Million USD and
 - If investment by way of swap of shares (*FIPB approval also required*)
 - ❖ By a Category 1 Merchant Banker registered with SEBI or
 - An Investment banker registered with host country
- If by way of partial or full acquisition of an existing foreign company where investment in less than 5 Million USD
 - ❖ Each AD Bank to ensure valuation compliance considers valuation as per internationally accepted pricing methodology for valuation.
 - ❖ See the AD Valuation report on Octo 2022
 - ❖ Not more than 2 layer of Structuring.

Transfer of share of JV/WOS

Without writ off of FC	With writ off FC
<p>➤An Indian party can sell shares to another Indian party or a person resident outside India <u>without RBI approval</u> if :</p> <ul style="list-style-type: none"> ➤Sale is done through stock exchange if they are listed overseas ➤if sale is done through private placement – at a value not less than that certified by a CA/CPA at its fair value as per latest audited financial statements (International Standard ?) ➤There is no outstanding dues by way of dividend, fees, royalty, export proceeds etc from the JV/WOS. ➤The JV/WOS has been in operation for at least one full year. (APR filed for one year) ➤Indian party should give details of such disinvestment post sale to the AD bank within 30 days from date of disinvestment. 	<p>➤An Indian party can disinvest, <u>without prior approval</u> of RBI, even if it leads to a write off of the investment made if</p> <ul style="list-style-type: none"> ➤JV/WOS is listed on overseas stock exchange ➤Indian party is listed on Indian stock exchange and has net worth of least Rs. 100 crores. ➤Indian party is unlisted and investment overseas is below USD 10 million ➤Indian party is listed with net worth of below Rs. 100 crore and investment overseas is below USD 10 million. <p>➤Listed Indian companies can write off capital and other receivables upto 25% of equity investment in JV/WOS under automatic route</p> <p>➤Unlisted Indian companies can do so upto 25% under approval route.</p> <p><u>Beyond above limits – prior RBI approval is required</u></p>

Loans/guarantees to be given by Indian party to JV/WOS

- Loans/guarantee can only be extended if Indian party has equity participation.
- Prior RBI approval required if loan/guarantee to be given without equity participation.¹
- Indian party can issue corporate guarantee on behalf of first level step down operating JV/WOS where the in-turn subsidiary is operating as an operating unit.²
- The renewal/rollover of an existing/original guarantee will not be treated as a fresh financial commitment provided.³
- If the above is not met – prior RBI approval will be required.

Conditions for Issue of Guarantees

- All guarantees are within the financial commitments limits for Indian party.
- All guarantees' should be closed ended i.e. amount and period of guarantee to be defined upfront
- For performance guarantee – time of period for which valid to be defined
- If the invocation of the performance guarantee results in breach of limits in force of financial commitment – prior RBI approval will be required
- For issuance of a corporate guarantee on behalf of second generation or subsequent level step down operating subsidiaries, prior RBI approval will be required which will be considered only if the Indian party indirectly holds at least 51% of the overseas subsidiary for whom guarantee is to be issued.

ODI in Financial Services Activity

Indian Entity	ODI in FE	Conditions
Engaged in FS Activities	Engaged in FS Activity	3 years NP of Indian entity, Registered with FS regulator in India and obtained approval for said investment both in India and host country
	Engaged in non FS-Activity	As per guidelines by regulator in India
Not Engaged in FS Activity	Engaged in FS Activity (excluding banking and insurance)	3 years NP of Indian entity
	General and Health Insurance business	3 years NP of Indian entity and supports core activity undertaken overseas by IE

Reporting/ Compliance requirements

- Form FC to be submitted with Form A-2
 - A copy of Board resolution authorising making of said application
 - A CA certificate for net worth of the Indian party
 - A valuation report
 - Incorporation documents of the overseas JV/WOS if in existence
 - Last audited financial statements of overseas entity if in existing entity
- Documents to be submitted to AD-Bank which after verification will report to RBI
- RBI will allot a UIN number
- Remittance can be made only after obtaining UIN
- Share certificate to be obtained within 180 days of making remittance

- APR in respect of each foreign entity by December 31 every year.
 - APR data has to be based on the audited annual accounts for the last year.
 - If local laws do not require an audit to be done , same can be submitted
 - on unaudited annual accounts provided
- Indian party statutory auditor certifies that audit is not required
- Board of Indian party adopts the unaudited financial statements.
- If there are multiple Indian Parties/Resident Individuals which have invested in same entity overseas – the responsibility to submit APR is on that having maximum stake in JV/WOS abroad.
- An annual return of Foreign Liabilities and Asset (“FLA”) to RBI by OCT every year.

THANK YOU

Sachin Mishra
Head- Legal & Company Secretary