

DELHI CHAPTER OF THE CHAMBER OF TAX CONSULTANTS - TWO DAY INTENSIVE STUDY COURSE ON FEMA

Foreign Inbound Investment – FEMA 20(R)/Schedules 1 (FDI/capital instruments), 4 (Investment on non-repatriation basis) & 6 (Investment in a Limited Liability Partnership)

Presented by:

Mr. Paresh P. Shah

P.P. Shah & Associates

Chartered Accountants

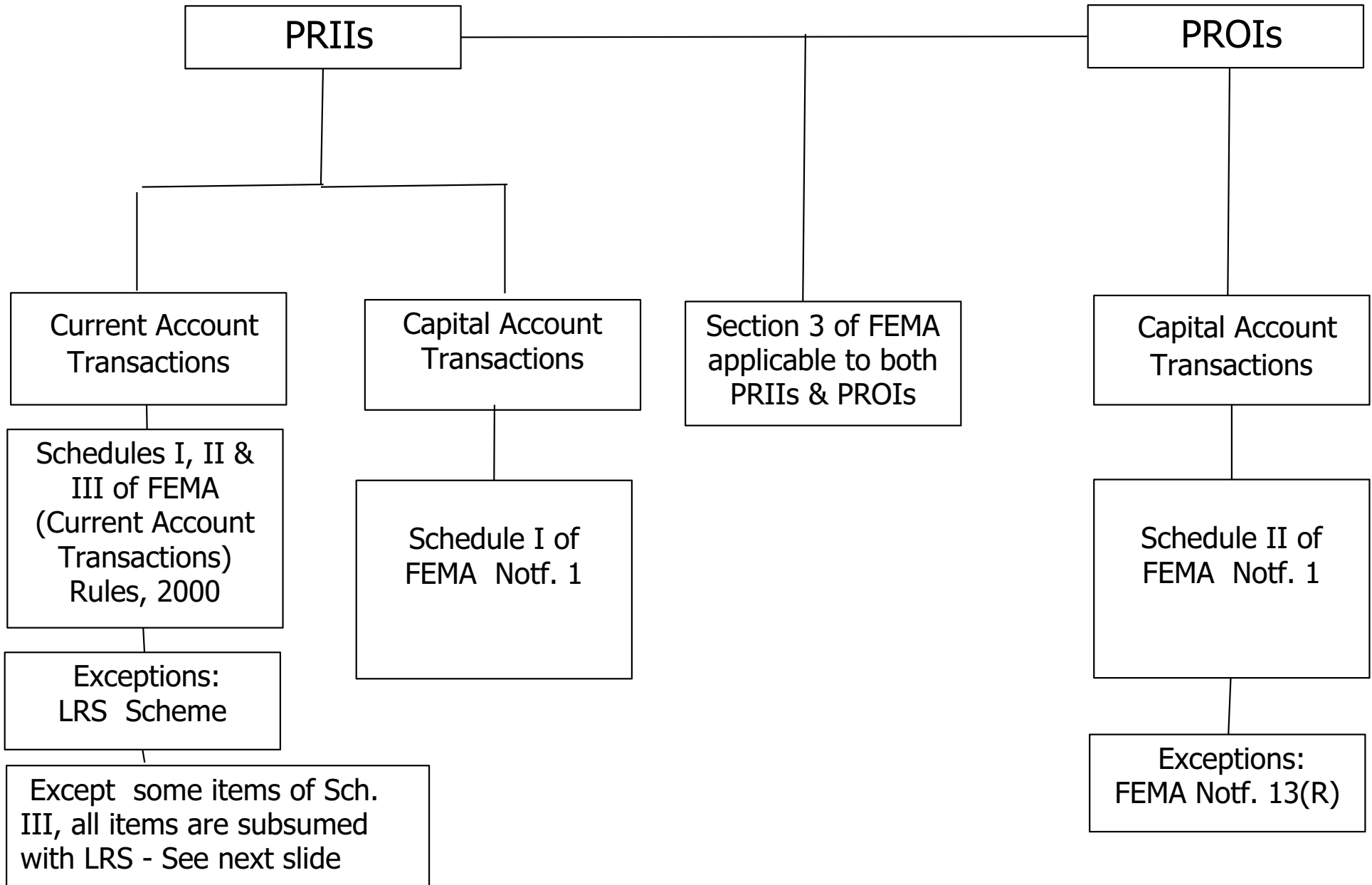
Email: ppshahandassociates@gmail.com



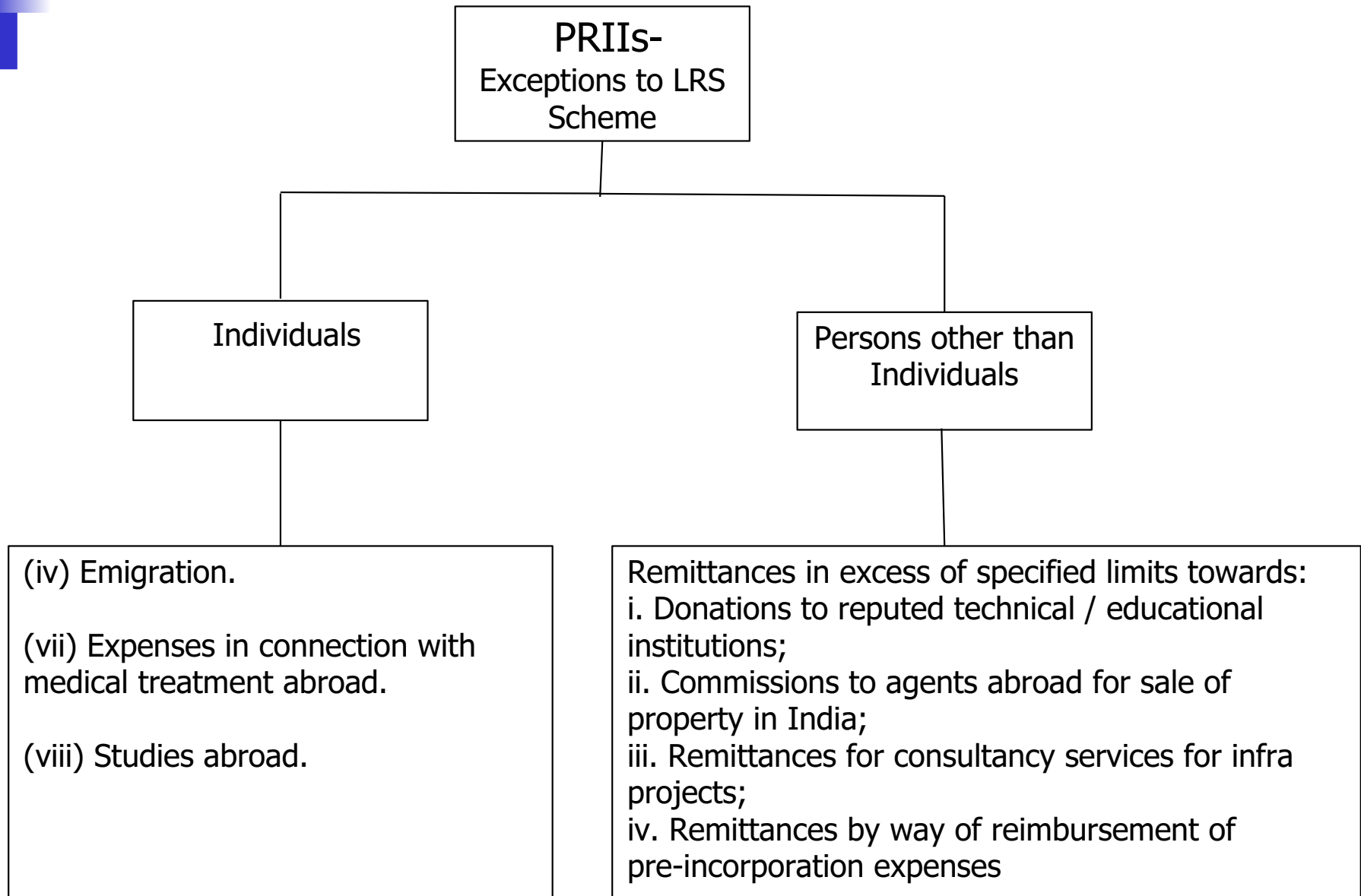
Overview

- FEMA Practice
- FEMA Ntf. 20(R)
- Schedule 1 (FDI)
- Schedule 4 (NRI on non-repatriation basis)
- Schedule 6 (LLP)
- FDI Policy – Select sectors
- FDI Policy – Practical Issues
- Abbreviations: Authorised Dealer(AD),
Capital Account transaction (CAP),
Current Account Transaction(CAT),
Foreign Exchange(FE),
Government of India (GOI) ,
Notification no.(Notf.),
Person Resident Outside India(PROI),
Person Resident in India (PRII),
Reserve Bank of India (RBI),
Non repatriable basis (NRB)
Repatriable basis(RB)
Subject to (SBT)

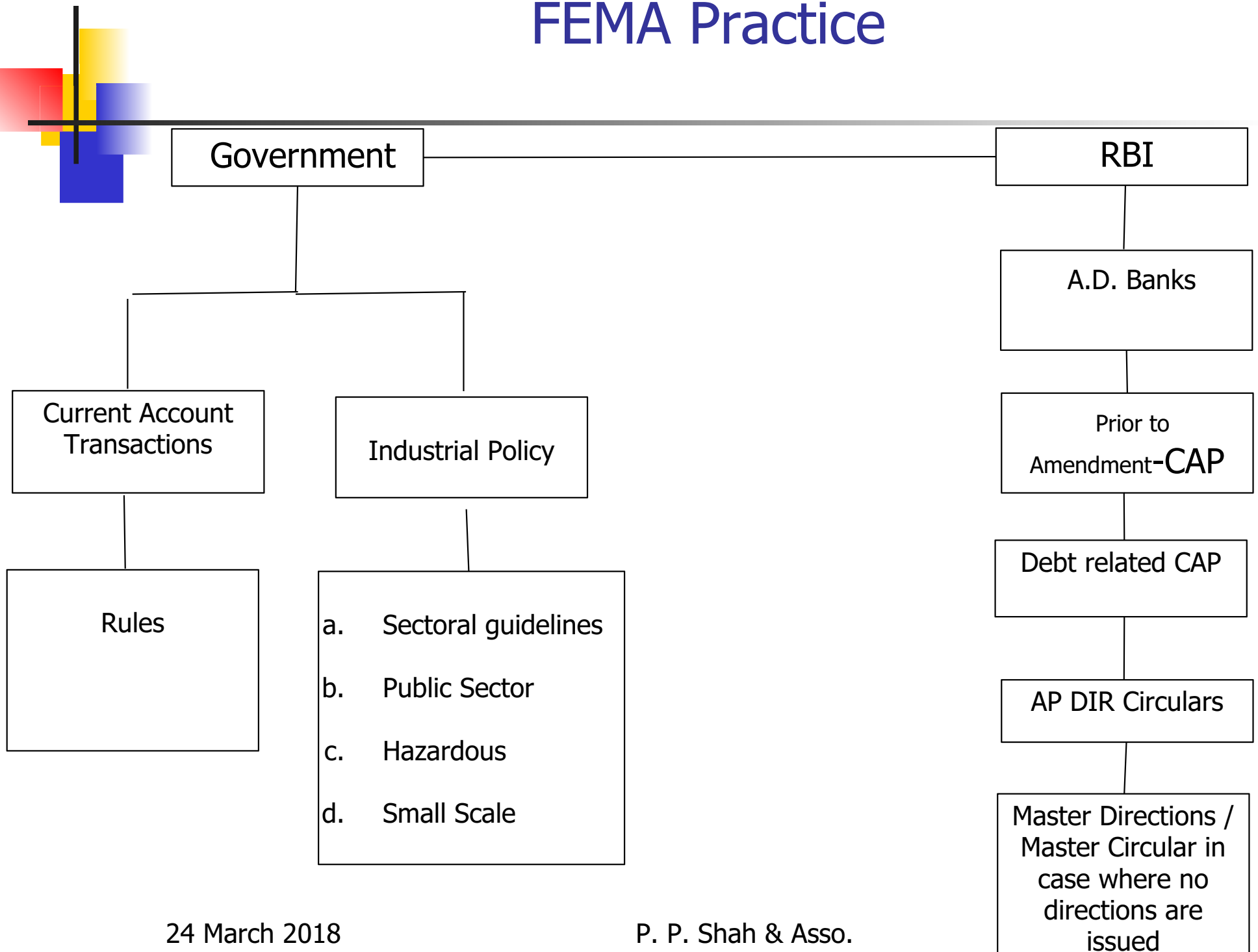
FEMA Practice



FEMA Practice



FEMA Practice



FEMA Practice

	PROI		
	Foreign Citizen	NRIs	Other entities
Deposit- Notf.5(R) –Banking Accounts of PROI plus few cases in Notf. 10(R)	[Can open for limited purpose as mentioned in Notf.5(R) & 10(R)]	√ [Notf.5(R)]	√ [Notf.10 (R)]
Branch /Liaison - Notf. 22(R)	NA	NA	Prior approval through AD √ [except citizen of 8 countries]
Project office	NA	NA	Auto Route with conditions except 7 citizens
Immovable property in India- Notf.21	X	√	√ [For branch, office or other place of business for carrying on in India any activity, excluding a liaison office]

FEMA Practice

	PROI		
	Foreign Citizen	NRIs	Other entities
Partnership business in India- Notf.24 [Now subsumed under Ntf. 20(R) w.e.f. 07.11.2017]	X (Prior approval on Repatriation basis)	√ (Auto Route on non repatriation basis ,Repatriation -Prior approval)	(Prior approval on repatriation basis)
Borrowings in rupees	Restricted only to rupee borrowings		
Notf 4		<ul style="list-style-type: none"> -From relative SBT End use restrictions.(Reg 8B) -Special provision for housing loan by AD in rupee to non resident and loan against security of shares and immovable property (Reg.8 and 7) -body corporate registered or incorporated in India may grant rupee loan to its employees who is a non-resident Indian or a Person of Indian Origin(Regulation 8A) -Loan for acquiring share of Indian co. under ESOP (Reg.7) -loan granted to a non-resident by an authorised dealer, in accordance with Regulation 7 , may be repaid by any relative of the borrower in India by crediting the borrower's loan account through the bank account of such relative.(Reg7A) 	

FEMA Practice

	PROI		
	Foreign Citizen	NRIs	Other entities
Lending in FE		Close relative in Foreign exchange- Notf.3	ECB
Lending in rupee		Indian co- NCD- Notf.4 Notf.5 – against fund held in account	
Lending by way of Deposits		Schedule 6 & 7 of notf.5(R) , Loan from NRO account, Commercial paper	
Portfolio Investment	Notf. 20(R) – schedule 2, 5,8	[Notf. 20(R) - schedule 3 and 5]	Notf. 20(R) – schedule 2, 5,8
FDI	Notf. 20(R) - schedule 1,6,7,8	Notf. 20(R) - schedule 1,4, 6,7	Notf. 20 (R)- schedule 1,6,7,8



FEMA Practice

Structure the transaction as compliant with conditions of Automatic route

- Permissible transactions of every person either PRII or that of PROI are specific as to General or Specific Approval.

eg. Schedule 1 to 10 of Notf20(R) and Purpose of Notf 20/21/FDI. Purpose of drawal-Specific to use.

- Ability to structure any transaction as Current account transaction
- Interpretation of the provision, intention and philosophy is preferable over the literal meaning.
- A Circular law- Dynamics

FEMA Practice – Recent issue of Master Directions

Foreign Exchange Management Act was **enacted in 1999** with 25 original notifications came into force with effect from June 1, 2000.

- Over the years the regulations framed under FEMA have had **over 330+ amendments** .
- Keeping in view the objective of promoting ease of doing business, a need was felt **to consolidate the regulations and rationalise them** in the light of evolving business environment and changing practices in cross-border transactions relating to external trade and payments.
- **17 Master Directions issued on 04 January 2016 and 1 Master Direction on FDI issued on 04 January 2018 - Consolidated** relevant A.P (DIR Series) Circulars issued so far
- All master regulations will be **fully updated and placed online** .
- Reserve Bank will issue Master Directions **on all regulatory matters** .
- The **Master Directions to be issued will consolidate instructions on rules and regulations framed by the Reserve Bank under various Acts** including banking issues and foreign exchange transactions.
- The process of issuing Master Directions involves issuing one Master Direction for each subject matter covering all instructions on that subject. **Any change** in the rules, regulation or policy will be communicated during the year **by way of circulars** . The **Master Directions will be updated suitably** and simultaneously whenever there is a change in the rules/regulations or there is a change in the policy.
- All the changes will get reflected in the Master Directions available on the RBI website **along with the dates on which changes are made** .
- **Explanations of rules and regulations** will be issued by way of **Frequently Asked Questions (FAQs)** after issue of the Master Directions **in easy to understand language wherever necessary**.
- The existing set of **Master Circulars** issued on various subjects will **stand withdrawn** with the issue of the Master Direction **on the subject** .

FEMA Practice - Revised Notifications & Master Directions

NTF. No.	Subject	Revised NTF. No., if issued	Master Direction, if issued
1	Permissible Capital Account Transactions	-	-
2	Issue of Security in India by a branch, office or agency of a PROI	-	-
3	Borrowing and lending in Foreign currency	-	FED No. 5 / 2015-16
4	Borrowing and lending in Rupees	-	FED No. 6 / 2015-16
5	Deposits by NRs	FEMA 5(R)_ FEM (Deposit) Regn. 2016 dt. 01.04.2016	FED No. 14 / 2015-16
6	Export and Import of foreign currency	FEMA 06(R)_ FEM (Import & Export of Currency) Regn 2015 dt 29.12.2015	
7	Acquisition and transfer of immovable properties outside India	FEMA 7(R)_ FEM (Acquisition and Trnsfr of Immovable Properties outside India) Regn 2015 dt 21.01.2016	FED No. 12 / 2015-16
8	Guarantees	-	-
9	FE realisation, repatriation, surrender	FEMA 09(R)_ FEM (Realisation, repatriation, surrender of FX) Regn 2015 dt 29.12.2015	-
10	Foreign Currency Accounts by a PRII	FEMA 10(R)_ FEM (Foreign Currency Accounts by PRII) Regn 2015 dt 21.01.2016	FED No. 14 / 2015-16
11	Possession and retention of Foreign currency	FEMA 11(R)_ FEM (Possession and Retention of FC) Regn 2015 dt 29.12.2015	-
12	Insurance	FEMA 12(R)_ FEM (Insurance) Regn 2015 dt 29.12.2015	FED No. 9 / 2015-16
13	Remittance of assets in India	FEMA 13(R)_ FEM (Remittance of Assets) Regn 2016 dt 01.04.2016	FED No. 13 / 2015-16

FEMA Practice - Revised Notifications & Master Directions

NTF. No.	Subject	Revised NTF. No., if issued	Master Direction, if issued
14	Manner of receipt and payment	FEMA 14(R)_ FEM (Manner of Receipt and Payment) Regn 2016 dt 02.05.2016	-
15	Definition of Currency	FEMA 15(R)_ FEM (Currency) Regn 2015 dt 29.12.2015	-
16	Receipt and payment to person outside India	-	-
17	Transaction in Indian rupees with resident of Nepal and Bhutan	-	-
18	Post Office (Postal Money Orders)	FEMA 18(R)_ FEM (Postal Money Order) Regn 2015 dt 29.12.2015	-
19	Overseas Direct Investment	-	FED No. 15 / 2015-16
20	FDI, PIS	FEMA 20(R)_ (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 dt. 07.11.2017	FED No. 11 / 2017-18
21	Immovable property in India	-	FED No. 12 / 2015-16
22	Branch etc in India	FEMA 22(R)_ FEM (Branch Liaison Project office) Regn 2016 dt 31.03.2016	FED No. 10 / 2015-16
23	Export of Goods & Services	FEMA 23(R)_ FEM (Export of Goods & Services) Regn 2015 dt 12.01.2016	FED No. 16 / 2015-16
24	Investment in Firm or Proprietary concern in India	SUBSUMED IN FEMA 20(R) w.e.f. 07.11.2017	-
25	Foreign exchange derivative contracts	-	-



FEMA Practice - Revised Notifications & Master Directions

Subject	Master Direction
Import of Goods & Services	FED No. 17 / 2015-16
Liberalized Remittance Scheme	FED No. 7 / 2015-16
Compounding of Contraventions	FED No. 4 / 2015-16
Other Remittance facilities (current account)	FED No. 8 / 2015-16
Reporting under FEMA	FED No. 18 / 2015-16
Misc Directions that do not figure in other Master Directions (TDS on remittances, repatriation of assets abroad & under LRS, Medical expenses of NRI, Routing of funds to India, SIT - sharing of information, IFSC guidelines, FEMA & Black Money Act)	FED No. 19 / 2015-16
Money Changing Activities	FED No. 3 / 2015-16
Vostro Accounts by Non-Resident Exchange Houses	FED No. 2 / 2015-16
Gold Monetisation Scheme 2015 dt 22.10.2015_amended to 21.01.2016	DBR.IBD.No.45/ 23.67.003 / 2015-16

FEMA NTF. 20 (OLD) – Schemes for Inbound Investment

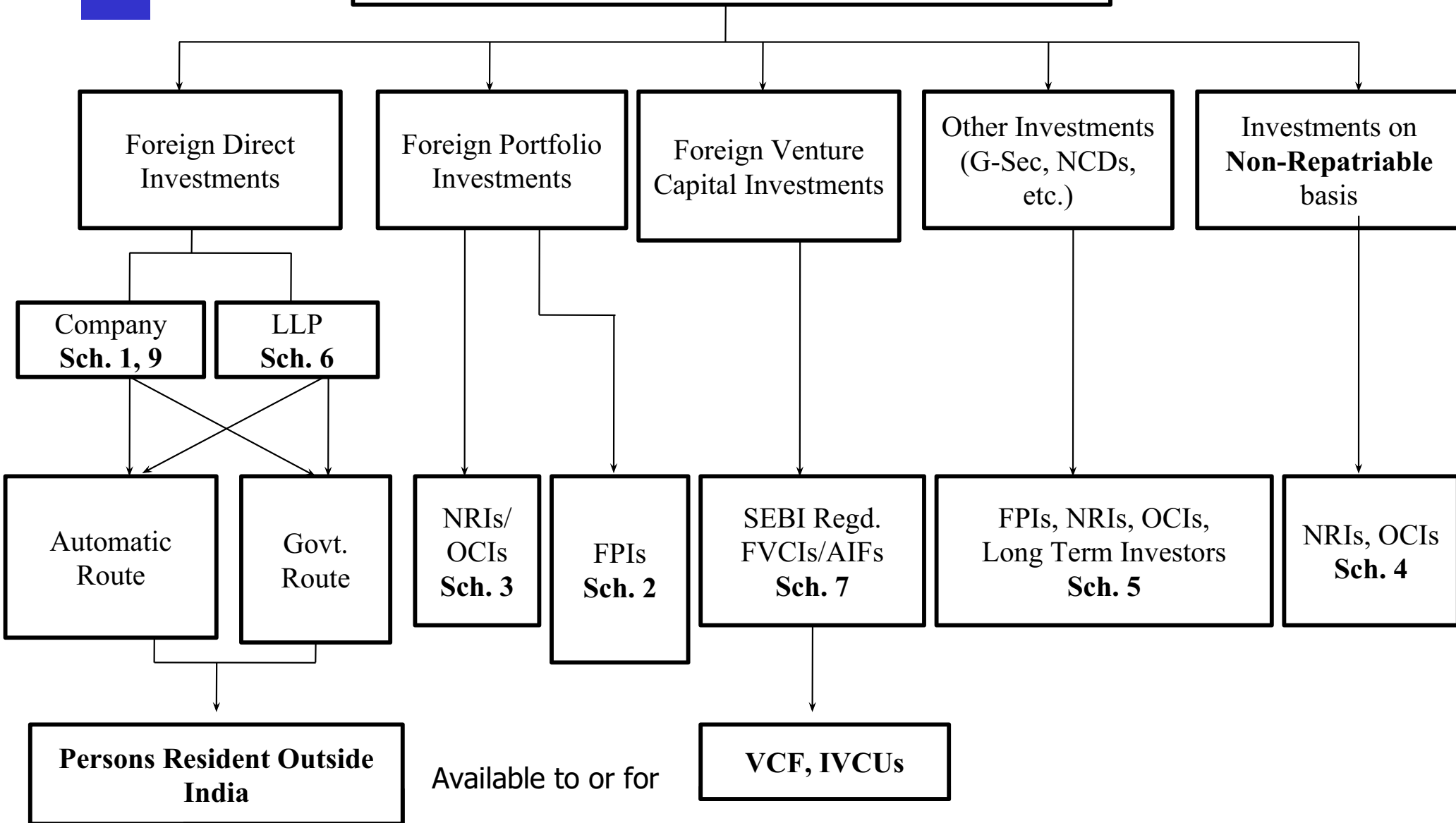
Sch. 1	Foreign Direct Investment ('FDI') Scheme
Sch. 2 & 2A	Purchase/Sale of shares or convertible debentures or warrants of an Indian Company by Registered Foreign Portfolio Investor (RFPI) under Foreign Portfolio Investment (FPIs) Scheme (Registered FIIs under Sch. 2 subsumed with Sch. 2A)
Sch. 3	Acquisition of Securities or Units by a Non-Resident Indian (NRI) on a Stock Exchange in India on Repatriation basis under the Portfolio Investment Scheme
Sch. 4	Acquisition of Securities or units by a Non-Resident Indian (NRI), on Non-Repatriation basis
Sch. 5	Purchase and Sale of Securities other than Shares or Convertible Debentures of an Indian company by a person resident outside India
Sch. 6	Investment by a registered Foreign Venture Capital Investor
Sch. 7	Indian depository receipts by eligible companies resident outside India
Sch. 8	Scheme for investment by Qualified Foreign Investors in equity shares (Subsumed under Sch. 2A)
Sch.9	Scheme for Acquisition/Transfer by a person resident outside India of capital contribution or profit share of (LLPs)
Sch. 10	Depository Receipts Scheme, 2014 (DRs)
Sch. 11	Investment by a person resident outside India in an Investment Vehicle
Composite Caps: Foreign investments, direct or indirect, under Schedule 1(FDI), 2 (FII), 2A (FPI), 3 (NRI), 6 (FVCI), 8 (QFI), 9 (LLPs) and 10 (DRs) vide PN 8 dated 30 July 2015 by DIPP	

FEMA NTF. 20(R) – Schemes for Inbound Investment (NEW)

Sch. 1	Purchase / Sale of capital instruments of Indian company by PROI (i.e. Foreign Direct Investment ('FDI') Scheme)
Sch. 2	Purchase/Sale of capital instruments of listed Indian company on recognised stock exchange in India by Foreign Portfolio Investor (i.e. Portfolio Investment Scheme)
Sch. 3	Purchase/Sale of capital instruments of listed Indian company on recognised stock exchange in India by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on repatriation basis (i.e. Portfolio Investment Scheme)
Sch. 4	Purchase/Sale of capital instruments or convertible notes of an Indian company or Units or contribution to capital of an LLP by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on non-repatriation basis
Sch. 5	Purchase and Sale of Securities other than capital instruments by a person resident outside India
Sch. 6	Investment in a Limited Liability Partnership (LLP)
Sch. 7	Investment by a Foreign Venture Capital Investor (FVCI)
Sch. 8	Investment by a person resident outside India in an Investment Vehicle
Sch.9	Investment in Depository receipts by a person resident outside India
Sch. 10	Issue of Indian Depository Receipts (IDRs)

Foreign Investment in India- Schematic Representation

Foreign Inbound Investments



Schemes for Inbound Investment – FEMA Ntf. 20(R)

- **Important Regulations of FEMA Ntf. 20(R):**

3. Restriction on investment by a person resident outside India

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 the Reserve Bank 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.

4. Restriction on receiving investment

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.

Schemes for Inbound Investment – FEMA Ntf. 20(R)

• Important Regulations of FEMA Ntf. 20(R) (con't):

- 5.** Permission for making investment by a person resident outside India [Sch. 1 to 10].
- 6.** Acquisition through a rights issue or a bonus issue.
- 7.** Issue of shares under Employees Stock Options Scheme to persons resident outside India.
- 8.** Issue of Convertible Notes by an Indian startup company.
- 9.** Merger or demerger or amalgamation of Indian companies.
- 10.** Transfer of capital instruments of an Indian company by or to a person resident outside India.
- 11.** Pricing Guidelines.
- 12.** Taxes and Remittance of sale proceeds.
- 13.** Reporting requirements.
- 14.** Downstream Investment.
- 15.** Prohibited activities for investment by a person resident outside India.
- 16.** Permitted sectors, entry routes and sectoral caps for total foreign investment.



Important conditions of Automatic Route of FDI

- Sectors
- Conditionalities
- FDI not for acquiring existing company
- Issue and Transfer
- Valuation norms
- Re-lending or stock market operations or prohibited activities
- Payments to be received in FE
- Reporting as per Regulations
- FDI in LLP – not at par with Investee Indian company
- Investment under Schedule 4 – a deemed Resident investment - meaning



Foreign Direct Investment in India

- Regulatory & Legal Framework
 - Industrial Development (Regulation) Act, 1951 & FEMA 1999

- Overall Policy of Government, mainly focusses on
 - Public Sector
 - Compulsory Licensing
 - Erstwhile Small Scale Sector – Micro, Small & Medium Enterprises (Development) Act, 2006.
 - Locational Restrictions

- Prohibitions.

- Consolidated FDI policy, Sector Specific Guidelines (Regn. 16 of FEMA Ntf. 20(R)), Automatic route & Procedures

- FEMA provides for Rules/ modes of investment, manner of receipts, Valuations and reporting procedures.

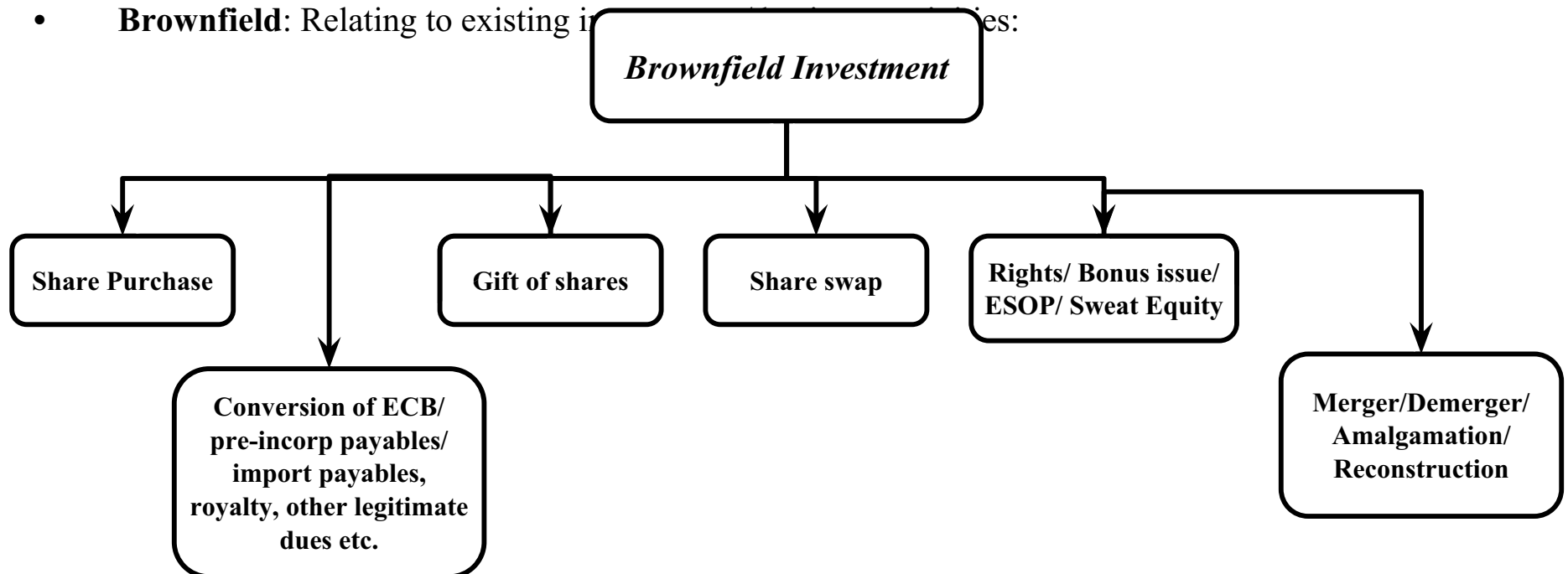
Foreign Direct Investment into an Indian company

Kinds of Investment

- **Automatic Route** – no prior approval from the RBI/ Government
- **Approval Route** – prior approval of the concerned Administrative Ministries / Departments is required (FIPB abolished w.e.f. 05.06.2017)

Mode of Investment

- **Greenfield:** Setting up a new JV/ WOS (**fresh issue** of shares)
- **Brownfield:** Relating to existing investments:





Automatic Route of Investment to PROI

- Main Conditions of issue of Shares (Reg. 5, Schedule 1, Notification No. FEMA 20(R)/2017-RB dated Nov 7, 2017).

- Eligible Persons:
 - PROI other than citizen of Pakistan, entities of Pakistan.

 - Bangladesh Citizens & entities only with prior approval of FIPB.

 - OCB: Bonus Shares permitted, Right Shares with RBI Approval.

 - A company, trust and partnership firm incorporated outside India and owned and controlled by NRIs can invest in India with the special dispensation as available to NRIs under the FDI Policy

 - FPI under Sch. 2 may invest in excess of PIS limits upto sectoral cap / statutory ceiling subject to prior intimation to RBI

 - SEBI registered FVCI may contribute up to 100% of capital of Indian company under Sch. 7



Automatic Route of Investment to PROI

- Eligible Investee Entities:
 - Indian companies
 - Partnership Firm / Proprietorship concern (only for NRI / OCI on non-repatriation basis)
 - Trusts in the form of SEBI regulated Venture Capital Fund
 - Limited Liability Partnerships
 - Investment Vehicles: SEBI registered and regulated Alternative Investment Funds, Real Estate Investment Trusts and Infrastructure Investment Trusts

Approval Route of Investment to PROI

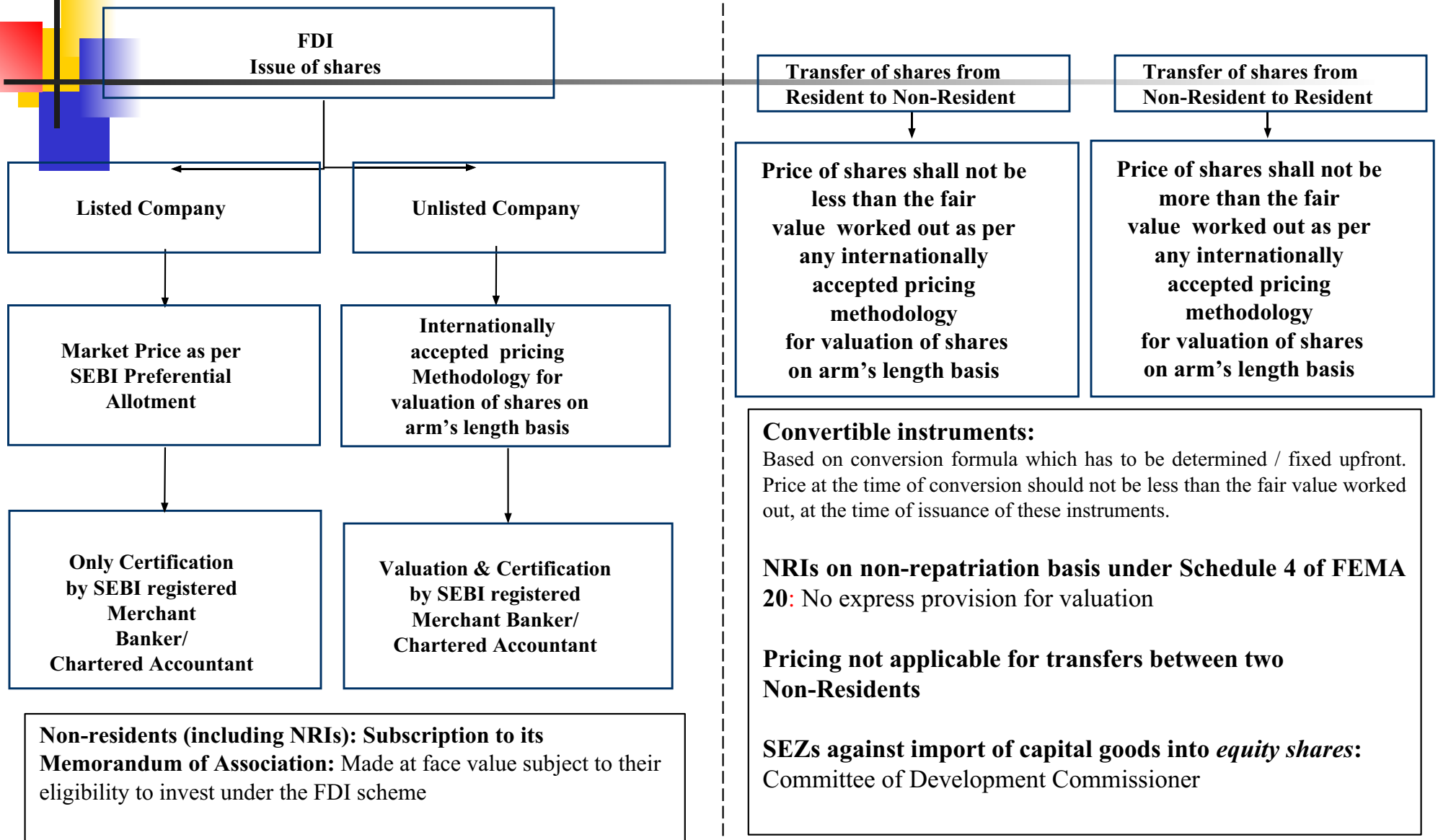
For FDI not eligible under the Automatic route / in sectors requiring prior government approval, the work of granting approval for foreign investment under the extant FDI Policy and FEMA Regulations, has been entrusted to the concerned Administrative Ministries / Departments after abolition of FIPB w.e.f. 05.06.2017

- The eleven notified sectors/activities requiring government approval are Mining, Defence/cases relating to FDI in small arms, Broadcasting, Print media, Civil Aviation, Satellites, Telecom, Private Security Agencies, Trading(Single, Multi brand and Food Products), Financial services not regulated or regulated by more than one regulator/ Banking Public and Private (as per FDI Policy) and Pharmaceuticals.
- The Department of Industrial Policy and Promotion, Ministry of Commerce & Industry has been given the responsibility of overseeing the applications filed on the **Foreign Investment Facilitation Portal (fifp.gov.in)** and to forward the same to the concerned Administrative Ministry.
- A Standard Operating Procedure (SOP) developed by DIPP in consultation with the concerned Administrative Ministries is being followed for processing of the FDI applications. Approval letters in Standard Format will be uploaded on the Portal itself for the benefit of the Investors.

Types of instruments: 'Capital'

Equity shares	
Fully, compulsorily & mandatorily convertible Preference Shares	
Fully, compulsorily & mandatorily convertible Debentures	
Differential voting rights shares as to dividend, voting or otherwise	Permitted
Non-convertible , optionally convertible or partially convertible instruments considered as debt	<ul style="list-style-type: none"> ▪ To comply with ECB norms
Warrants: Upfront 25% of consideration and the balance amount within eighteen months of issuance of share warrants <ul style="list-style-type: none"> ▪Upfront pricing/ conversion formula 	
<ul style="list-style-type: none"> ▪Partly paid 'Equity Shares' only: Upfront 25% of consideration including premium; Full payment in 12 months 	
Optionality clauses: 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.	

FEMA & Valuation



Preferential Allotment Pricing Guideline under SEBI (ICDR) Regulations 2009:

“Price not less than the higher of Avg. weekly high and low closing price over a trailing six month period, or a trailing two week period, from the "relevant date of transaction.” “Relevant Date” means date thirty days prior to the date of GM of shareholders



Issue of Shares- Other modes

- Issue of Bonus Shares allowed.
- Issue of Right Shares
 - Price offered to PROI can not be lower than that offered to PRII.
 - Additional Shares allowed within FDI Ceiling.
 - Existing OCB allowed with prior approval.
- Amalgamation / Demerger
 - Amalgamating/ transferee company can issue shares if it is engaged in eligible sector and observes FDI ceiling.
 - Reports the transaction to RBI within 30 days of such NCLT order of amalgamation with percentage of capital held by PROI in transferor, transferee or new company before or after the transfer.

Issue of Shares - Other modes – ESOP / Sweat Equity

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 :

- a) The scheme has been drawn either in terms of regulations issued under the Securities 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.
- b) The “employee’s stock option”/ “sweat equity shares” issued to non-resident employees/directors under the applicable rules/regulations are in compliance with the **sectoral cap** applicable to the said company.
- c) Issue of “employee’s stock option”/ “sweat equity shares” in a company where foreign investment is under the **approval route** shall require prior Government approval.
- d) Issue of “employee’s stock option”/ “sweat equity shares” to a citizen of **Bangladesh/Pakistan** shall require prior Government approval.



Mode of Payment

- (i) **Inward remittance** through normal banking channels
- (ii) Debit to **NRE / FCNR** account of a person concerned maintained with an AD category I bank
- (iii) **Conversion** of royalty / lump sum / technical knowhow fee/ legitimate due for payment or conversion of ECB, shall be treated as consideration for issue of shares
- (iv) **Conversion** of import payables / pre incorporation expenses / share swap can be treated as consideration for issue of shares with the approval of FIPB
- (v) Debit to non-interest bearing **Escrow account** in Indian Rupees in India which is opened with the approval from AD Category – I bank and is maintained with the AD Category I bank on behalf of residents and non-residents towards payment of share purchase consideration



Other important conditions in FDI Policy

- **Caps in Investments:**

Investments can be made by non-residents in the capital of a resident entity only to the extent of the percentage of the total capital as specified in the FDI policy. The caps in various sector(s) are detailed in the Consolidated FDI Policy and in Regulation 16 of FEMA Ntf.20(R)

- **Entry conditions:**

Investments by non-residents can be permitted in the capital of a resident entity in certain sectors/activity with entry conditions. Such conditions may include norms for minimum capitalization, lock-in period, etc. and are specified in the Consolidated FDI Policy

- **Other conditions:**

Besides the entry conditions on foreign investment, the investment/investors are required to comply with all relevant sectoral laws, regulations, rules, security conditions, and state/local laws/regulations.

- **Foreign Investment into/downstream Investment by eligible Indian entities:**

The Guidelines for calculation of total foreign investment, both direct and indirect in an Indian company/LLP, at every stage of investment, including downstream investment are specified in the Consolidated FDI Policy and in Regulation 14 of FEMA Ntf.20(R)



Reporting of FDI

Offline reporting

Physical filing of FC-GPR, ARF and FCTRS forms is discontinued from **February 8, 2016** and online filing through government's e-Biz portal has been made mandatory.

■ **Online reporting through eBiz Portal of GOI**

- With a view to promoting the ease of reporting of transactions under foreign direct investment (FDI), the filing of the ARF, Form FC-GPR and Form FCTRS has been enabled under the e-Biz platform of the Government of India.
- The design of the reporting platform enables the customer to login into the e-Biz portal, download the reporting forms, complete and then upload the same onto the portal using their digitally signed certificates.
- The Authorised Dealer Banks (ADs) will be required to download the completed forms, verify the contents from the available documents, if necessary by calling for additional information from the customer and then upload the same for RBI to process and allot the Unique Identification Number (UIN).

Reporting of FDI Inflow

Form	Supporting	Time period	Action by Regional Office concerned	Non-compliance
Advance Reporting Form for shares / FCCD / FCPS / Warrants	<ul style="list-style-type: none"> ❖ FIRC/s/ Debit certificate evidencing receipt of remittance ❖ KYC report on non-resident investor 	Not later than 30 days from the date of receipt	Allotment of Unique Identification Number (UIN) for the amount reported	<ul style="list-style-type: none"> ❖ Contravention under FEMA ❖ Attracts Late Submission Fees and penal provisions
<p>In FIRC: Name of beneficiary; remitter bank; remitter; date of credit; INR equivalent; Purpose of remittance mentioned in FIRC</p> <p>Amount in INR/FC should match with FIRC/Bank certificate</p> <p>No KYC if debit to NRE/ FCNR(B)</p> <p>In AD Bank letter/ debit certificate for NRE/ FCNR(B) transfer: Name, account type, amount, date of debit</p>				

Reporting of Issue of Shares, etc.

Reporting of Issue of Fresh Shares /Partly paid shares/Bonus /Rights Shares /ESOP/ Convertible Debentures / Convertible Preference Shares /Conversion of ECB / Royalty / Lumpsum Technical Know-how Fee / Import of Capital Goods by SEZs /Pre-operative/Pre-incorporation Expenses/Legitimate dues/ Amalgamation/ Merger

Form	Supporting	Time period	Action by Regional Office concerned	Non-compliance
Form FC-GPR duly filled up on-line with digital signature of Director/ Authorised Person	<ul style="list-style-type: none"> A certificate from Company Secretary A certificate from SEBI registered Merchant Banker or Chartered Accountant for valuation 	Not later than 30 days from the date of issue	Taking on record the shareholding pattern	<ul style="list-style-type: none"> ❖ Contravention under FEMA ❖ Attracts Late Submission and provisions Fees and penal
<p>Reconciliation of shareholding pattern at RBI end (Fresh issue, transfers, reduction, merger, transfers from NR to NR etc.) – Previous RBI Acks, duly approved Form FC-TRS</p> <p>Onus of compliance with the sectoral /statutory caps on foreign investment and attendant conditions, if any, shall be on the company receiving foreign investment</p>				

Reporting of Transfer of shares/ convertible debentures/ partly paid shares/ warrants

Between (i) Non-Resident on repatriable basis and Non-Resident on non-repatriable basis, and (ii) Resident and Non-resident on repatriation basis (Regn. 10 of FEMA Ntf. 20(R))

- File form FC-TRS online through eBIZ Portal within 60 days of receipt of consideration (in quadruplicate)
- In respect of the transfer from resident to non resident, the Form has to be digitally signed by the non resident buyer, and in respect of the transfer from non-resident to resident the declaration has to be digitally signed by the non-resident seller.
- Onus of reporting is on transferor / transferee, resident in India
- Onus on reporting for purchase on recognized stock exchange will be on the Investee company
- Inward remittance subject to KYC norms (KYC check to be carried by remittance receiving bank)
- AD Bank shall certify FC-TRS as being in order
- Indian company can record transfer only post approval of Form-FC TRS by AD-Bank

Periodic reporting - Annual Return of Liabilities & Assets

To be filed electronically by Indian Companies to enable capture of statistics relating to Foreign Direct Investment, both inward and outward

- Due date: by July 15 of every year to the RBI, Mumbai
- To be submitted by all Indian companies which have received FDI and/or made FDI abroad in the previous year(s) including the current year
- Coverage:
 - Methodology for valuation of foreign liabilities and foreign assets
 - Nature of activities principal line of business as %, with NIC code (NIC Codes in the FCGPR and FCTRS forms as per the NIC 2008 version)
 - Name & country of non-resident investor under FDI
 - Financial derivatives, Money market instruments
 - Trade credits, loans, Currency & Deposits
 - ODI and Portfolio investment overseas
 - Contingent foreign liabilities
 - Disinvestments in India and Abroad
- The filled in Excel based FLA return should be forwarded through the official email id of any authorized person like CFO, Director, Company Secretary etc. Acknowledgement

Investment by NRIs on non-repatriation basis - Schedule 4 of FEMA Ntf. 20(R)

NRIs, including a company, a trust and a partnership firm incorporated outside India and owned and controlled by non-resident Indians, may without any limit, acquire & hold **on non-repatriation basis**, (i) shares or convertible debentures / preference shares, warrants of an Indian company issued whether by public issue or private placement or right issue (2) Units issued by an Investment vehicle

- Investment prohibited in chit fund or a nidhi company or company engaged in agricultural / plantation activities or real estate business or construction of farm houses or dealing in Transfer of Development Rights
- Investment should be by way of inward remittance through normal banking channels from abroad or out of funds held in NRE/FCNR/NRO account
- **Investment by NRIs under Schedule 4 of (erstwhile) FEMA 20 will be deemed to be domestic investment at par with the investment made by residents.** (*Press Note No.7 dated 3rd June, 2015*)
- 'Non-Resident Indian' (NRI) means an individual resident outside India who is a citizen of India or is an 'Overseas Citizen of India' cardholder within the meaning of section 7 (A) of the Citizenship Act, 1955. 'Persons of Indian Origin' cardholders registered as such under Notification No.26011/4/98 F.I, dated 19.8.2002, issued by the Central Government are deemed to be 'Overseas Citizen of India' cardholders. (*Vide The Citizenship (Amendment) Act 2015 w.e.f. 06 January 2015 read PN7 dated 03 June 2015*)

Investment by NRIs on non-repatriation basis - Schedule 4 of FEMA Ntf. 20(R)

Accordingly, now Overseas NRI Entity will be eligible for investment under Schedule 4 and such investment will be deemed domestic investment at par with investment made by Residents.

- Similarly, under FDI policy/scheme under Schedule 1, Overseas Entity can invest in India with the special dispensation as available to NRIs, e.g. (a) Scheduled Air Transport Services/Domestic Scheduled Passenger Airlines, (b) Regional Air Transport Service, (c) Condition of lock-in period in Construction-development projects. This dispensation is not available for investment by NRIs under Schedule 3.
- The concept of 'owned and controlled by NRIs' has not been defined under Schedule 4; but may be borrowed from Regulation 14. 'Control' shall include 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. A company is considered as 'Owned' by NRIs if more than 50% of the capital in it is beneficially owned by NRIs. A Partnership Firm will be considered as owned by NRIs if more than 50% of the investment in such firm is contributed by NRIs and such NRIs have majority of the profit share.

Investment by NRIs on non-repatriation basis - Schedule 4 of FEMA Ntf. 20(R)

Implications for investments made under Schedule 4 as they are deemed domestic investments:–

- Following restrictions which are applicable on investment made by non-residents under Schedule 1 are not applicable:
 - Investment restrictions on sectoral/statutory cap /conditionalities, entry route, pricing guidelines;
 - Reporting requirement (e.g. Advance Remittance Form, FC-GPR, FC-TRS, Form-ESOP, FDI- LLP (I), Form FDI- LLP (II), Annual Return on Foreign Liabilities and Assets, Downstream Investment Reporting), documentation, etc.;
 - Investments under schedule 4 are not counted for direct and indirect foreign investment;
 - Acquisition of Rights Shares/Bonus Shares/Shares after merger, demerger, amalgamation /ESOP/Pledge of shares: Limitations/restrictions contained in FEMA 20 may not apply to investments made under Schedule 4

- However, implications under Section 56(2) of Income-Tax Act, 1961 to be kept in view regarding fair price of shares

Investment in Limited Liability Partnerships - Schedule 6 of FEMA Ntf. 20(R)

FDI in LLPs:

- FDI is permitted under the automatic route in LLPs operating in sectors / activities where 100% FDI is allowed through the automatic route and there are no FDI linked performance conditions (such as 'Non Banking Finance Companies' or 'Development of Townships, Housing, Built-up infrastructure and Construction-development projects', or 'Retail sector' etc.)
- Eligible Investment: Contribution of foreign capital either by way of capital contribution or by way of acquisition / transfer of profit shares in the capital structure of an LLP
- Downstream Investment: An Indian company or an LLP, having foreign investment, will be permitted to make downstream investment in another company or LLP engaged in sectors in which 100% FDI is allowed under the automatic route and there are no FDI linked performance conditions.
- A company having foreign investment can be converted into an LLP under the automatic route only if it is engaged in a sector where foreign investment up to 100 percent is permitted under automatic route and there are no FDI linked performance conditions

Sectors eligible for investment by Limited Liability Partnerships under Auto route - Schedule 6 of FEMA Ntf. 20(R)

- **FDI in LLPs under automatic route is permitted only in Sectors / activities where 100% FDI is allowed under Automatic route AND there are no FDI linked performance conditions**

- **Sectors which are eligible for investment by LLP meeting these two criteria include:**
 - Agriculture & Animal husbandry activities as specified
 - Plantation activities as specified
 - Manufacturing except food products
 - Airports both greenfield and existing
 - Other services under Civil aviation sector - Maintenance and Repair organizations; flying training institutes and technical training institutions

Sectors not eligible for investment by Limited Liability Partnerships under Auto route - Schedule 6 of FEMA Ntf. 20(R)

➤ **Sectors which are not eligible for investment by LLP i.e. where 100% FDI is allowed under Automatic route but conditionalities are specified. These include:**

- Mining – coal & lignite
- Petroleum & Natural gas
- Broadcasting
- Non-scheduled Air transport services / Helicopter / seaplane services
- Construction Development: Townships, Housing, Built-up infrastructure
- Industrial Parks
- Trading – Wholesale cash-n-carry, B2B E-commerce
- Financial Services



Who can invest in Limited Liability Partnerships?

- As per Regulation 5(6) of FEMA Ntf. 20(R) read with Schedule 6, any person resident outside India
- Person includes: Individual, HUF, Company, Firm, AOP or BOI, artificial juridical person and any agency, office or branch owned or controlled by such person
- But under LLP Act, 2008, only Individuals and Body corporates are eligible to become partner in LLP. Body corporate is defined in Section 2(d) of LLP Act to include Indian & Foreign LLPs and Companies incorporated outside India
- Therefore, eligible investors / partners in LLP for FDI are:
 - Individuals, Indian / Foreign Companies and Indian / Foreign LLPs
- However, under Schedule 6 of FEMA Ntf. 20(R), Citizens / Entities of Pakistan & Bangladesh, FPIs, FIIs and FVCIs are not permitted to invest in LLPs

Investment in Limited Liability Partnerships - Schedule 6 of FEMA Ntf. 20(R)

FDI in LLPs – Other aspects:

- Capital contribution to LLP to be made by way of inward remittance or debit to NRE / FCNR (B) account (non-cash methods of capital contribution not specifically permitted)
- Pricing: FDI in a LLP either by way of capital contribution or by way of acquisition / transfer of profit shares, would have to be more than or equal to the fair price as worked out with any valuation norm which is internationally accepted / adopted as per market practice and a valuation certificate to that effect shall be issued by the Chartered Accountant or by a practicing Cost Accountant or by an approved valuer from the panel maintained by the Central Government.
- Transfer: In case of transfer of capital contribution / profit share from a resident to a non-resident, the transfer shall be for a consideration equal to or more than the fair price of capital contribution / profit share of an LLP. Further, in case of transfer of capital contribution / profit share from a non-resident to resident, the transfer shall be for a consideration which is less than or equal to the fair price of the capital contribution / profit share of an LLP.

Investment in Limited Liability Partnerships - Schedule 6 of FEMA Ntf. 20(R)

Reporting requirements of FDI in LLPs:

- Receipt of consideration for capital contribution or profit share – Within 30 days
 - Form Foreign Direct Investment – LLP(I)
 - Copies of FIRC
 - KYC report of non-resident investor
 - RBI will allot UIN for each remittance
- Transfer of capital contribution or profit share between Non-Resident and Resident – Within 60 days in Form Foreign Direct Investment – LLP(II)
- Annual compliance: Filing of Annual Return on Foreign Liabilities & Assets by 15th July every year



FDI Policy – Select sectors

Definition of ‘Manufacture’ inserted which is same as under Section 2(29BA) of the Income-tax Act:

Manufacture with its grammatical variations means a change in a non-living physical object or article or things – (a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or (b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure.

• Key issues

- As the definition of Manufacture is wide in scope and no norms are prescribed for minimum investment or value-addition, etc., this may give rise to interpretation issues.
- Therefore, can reliance be placed on judicial precedents under the Income tax Act to determine the eligibility for FDI under the FDI policy?
- Moreover, the earlier provisions for FDI in sectors reserved for Micro, Small & Medium enterprises is also dropped. It therefore implies that FDI exceeding 24% is now permitted without Govt. approval even in such reserved sectors.



FDI Policy – Select sectors(con't)

Single Brand Retail Trading ('SBRT') and 'Manufacture'

With the addition of 'Manufacture' sector, when read with the existing provisions relating to FDI in SBRT, these recent changes raises the following issues:

- If a Single Brand owner qualifies as 'Manufacturer' by undertaking processing in India (norms of which are not specified), then it may fall outside the purview of SBRT norms and undertake effectively the same retail business including through all routes - wholesale, retail, brick & mortar stores, eCommerce.
- When an SBRT seeks FDI beyond 51%, it is required to source 30% of the goods purchased from MSMEs in India and such brand is the one of manufacturer only. But SBRT means retail trading in single brand only, and it does not seem to imply manufacture (due to recent inclusion of 'manufacture' sector), so the question is what can it out-source from India for trading purposes, especially since it can engage only in single-brand retail trading of the goods branded during manufacturing such goods?
- Also, if the brand owner licenses the same to a third party for undertaking retail trading in India, how can such third party source 30% of the goods from India when it is not undertaking any part in the manufacture of the branded goods in the first place? Or does this sourcing requirement imply that a third party retailer should at least source 30% of the goods from India other than the branded goods which it is sourcing from the foreign brand owner-manufacturer?



FDI Policy – Select sectors (con't)

'Other Financial Services'

FEMA Notification no.FEMA.375/2016-RB dated September 9, 2016 amended the sectoral cap for 'other financial services' thereby doing away with the minimum capitalization norms.

Instead of specifying various activities, the provision has been simplified to mean Financial Services activities regulated by financial sector regulators, viz., RBI, SEBI, IRDA, PFRDA, NHB or any other financial sector regulator as may be notified by the Government of India. Financial service activities governed by aforesaid regulators will be permitted to bring 100% FDI under automatic route.

FDI in unregulated/ partly regulated financial sector activities or where there is doubt regarding the regulatory oversight, FDI will be permitted under approval route subject to conditions including minimum capitalization requirement, as may be decided by the Government.

Key issue:

- A number of financial services (e.g. non-fund based services) are now inadvertently brought under Govt. approval route as such services do not have any Regulator / Govt. agency monitoring the activities.



FDI Policy – Select sectors (con't)

'Defense Sector'

As per Consolidated FDI Policy, in Defence Industry subject to Industrial license under the Industries (Development & Regulation) Act, 1951 and Manufacturing of small arms and ammunition under the Arms Act, 1959, FDI is permitted upto 49% in automatic route and upto 100% through Govt. route if it is likely to result in access to modern technology or for other reasons to be recorded.

Licence applications will be considered and licences given by the Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, in consultation with Ministry of Defence and Ministry of External Affairs.

Foreign investment in the sector is subject to security clearance and guidelines of the M/o Defence.

Key issues:

- In case of items related to Defense sector but not falling under Industrial Licensing or Arms Act such as electronic components used in defense products as well as in other industries, how will the FDI Policy apply?
- In such cases, will security clearance from M/o Defense still be required?

FDI Policy – Select sectors – Real Estate

Real Estate Sector

Each phase of the construction development project to be considered as a separate project subject to the conditions

- Minimum area to be developed and minimum capitalization conditions deleted
- Exits simplified
 - Foreign investor can exit before the completion of project under automatic route subject to a lock-in-period of three years (calculated with reference to each tranche of foreign investment)
 - Transfer of stake from non-resident investor to another non-resident investor not involving repatriation neither subject to lock-in period nor Government approval
- Prohibited Real estate business ambit relaxed to exclude earning of rent /income on lease of the property not amounting to transfer and the term transfer **includes**:
 - Sale, exchange or relinquishment
 - Extinguishment of any rights or compulsory acquisition under law
 - Allowing possession under Section 53A of Transfer or Property Act
 - Any arrangement including transfer of shares which has effect of transferring or enabling enjoyment of immovable property
- **Key Issues:** What types of arrangements qualify under above provisions?

Earlier, such conditionalities did not apply to investment by NRIs. Now, with the removal of this exception, provisions have become more stringent for NRIs. Was this the intention?

FDI Policy – Select sectors – Real Estate (con't)

Investment in Real estate by NRI in India .

- Discuss the various alternative available to Mr. NRI in India to explore real estate business/ Purchase and sale of Immovable property in India
- Discuss these opportunity in the back ground of various provision under FEMA

FDI Policy – Select sectors – Real Estate (con't)

Overview of legal provision:

1. As per FDI POLICY 2017 FDI means - Investment by non-resident entity/person resident outside India in the capital of an Indian company under Schedule 1 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000
 2. As per schedule 4 of FEMA Notf.20(R) – a NRI including a company, a trust and a partnership firm incorporated outside India and owned and controlled by non-resident Indians may purchase and sale shares/Convertible debentures, warrants or units on Non- repatriation basis which will be deemed to be domestic investment at par with the investment made by residents.
However, no purchase of shares or convertible debentures, etc of an Indian company shall be made under this Scheme if the company concerned is a Nidhi company or is engaged in agricultural/plantation activities or real estate business or construction of farm houses or dealing in Transfer of Development Rights.
- Explanation: For the purpose of this paragraph, "Real estate business" means dealing in land and immovable property with a view to earning profit therefrom and does not include development of townships, construction of residential commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships. Further, earning of rent income on lease of the property, not amounting to transfer, will not amount to "real estate business". Investment in units of Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) regulations 2014 shall also be excluded from the definition of "real estate business"

FDI Policy – Select sectors – Real Estate (con't)

- 3. As per para 5.2.10 of FDI policy 2017 – 100% FDI under automatic route is allowed in Construction Development projects (which would include development of townships, construction of residential/commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships) subject to conditions specified in the policy. Conditions relating to lock-in period of 3 years do not apply to investment by NRIs.

- 4. Further as per Regulation 3 of Foreign Exchange Management (Acquisition and transfer of Immovable property in India) – Notf.21

A person resident outside India who is a citizen of India may -

- a) acquire immovable property in India other than an agricultural property, plantation, or a farm house:

- Provided that in case of acquisition of immovable property, payment of purchase price, if any, shall be made out of (i) funds received in India through normal banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank.

- Provided further that no payment of purchase price for acquisition of immovable property shall be made either by traveller's cheque or by foreign currency notes or by other mode other than those specifically permitted by this clause'.

- b) transfer any immovable property in India to a person resident in India.

- c) transfer any immovable property other than agricultural or plantation property or farm house to a person resident outside India who is a citizen of India or to a person of Indian origin resident outside India

Real Estate – Select sectors (con't)

■ Repatriation of sale proceeds

- In the event of sale of immovable property other than agricultural land/farm house /plantation property in India by a person resident outside India who is a citizen of India or a person of Indian origin, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:
 - (i) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations;
 - (ii) the amount to be repatriated does not exceed (a) the amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels or out of funds held in Foreign Currency Non-Resident Account or (b) the foreign currency equivalent, as on the date of payment, of the amount paid where such payment was made from the funds held in Non-Resident External account for acquisition of the property;
 - (iii) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

Real Estate – Select sectors(con't)

Summary of the provisions applicable to NRIs and PIOs under FEMA 21:

Particulars	NRI	PIO
Purchase (other than agricultural land/ farmhouse/ plantation etc) from	Resident/ NRI	Resident/ NRI
Acquire as gift (other than agricultural land/ farmhouse/ plantation etc) from	Resident / NRI/ PIO	Resident/ NRI/ PIO
Acquire (any IP) as inheritance from	(a) Any person who has acquired it under laws in force (b) under section 6(5) of FEMA	
Sell (other than agricultural land/ farmhouse/ plantation etc) to	Resident / NRI/ PIO	Resident
Sell (agricultural land) to	Resident	Resident who is a citizen of India
Gift (other than agricultural land) to	Resident / NRI/ PIO	Resident / NRI/ PIO
Gift (agricultural land) to	Resident	Resident who is a citizen of India
Gift residential/ commercial property to	Resident / NRI/ PIO	Resident / NRI/ PIO

FDI Policy – Select sectors(con't)

Broadcasting Sector and Print Media Sector

FDI Policy on Broadcasting Sector applies to Broadcasting Carriage Services (such as Cable Networks, DTH, Mobile TV, etc.) and Broadcasting Content Services being FM Radio, Up-linking of 'News & Current Affairs' and 'Non-News & Current Affairs' TV Channels / Downlinking of TV Channels

- FDI Policy on Print Media Sector applies to Publishing of newspaper and periodicals dealing with news and current affairs, Publication of Indian editions of foreign magazines dealing with news and current affairs, Publishing/printing of scientific and technical magazines/specialty journals, etc. and Publication of facsimile edition of foreign newspapers
- Detailed conditions including sectoral cap, entry route, etc. are specified for these sectors. Operational conditions seek to regulate the activities of the journalists through sector-specific laws & guidelines.
- It can be observed that both sectors deal with different methods of dissemination of information which may be News & Current Affairs or non-News & Current Affairs.
- However, Internet-based journalism and online dissemination of information through portals which is rapidly proliferating is not specifically covered under the FDI Policy under the above Sectors
- **Key Issue:** Can an Indian company proposing to engage in collection of news & current affairs, analysis & reporting / publishing of same through internet online portals invite FDI under automatic route? Is this a loop-hole in the law as the intention of the FDI Policy is to regulate foreign investment in sensitive sectors which deal with matters of national interest?



Practical Issues - FDI Policy

100% FDI in LLP under Automatic Route

- ❑ 100% FDI in LLP is permitted under Automatic Route provided the sectors /activities are falling under Automatic Route and there are no FDI-linked performance conditions.
- ❑ Further, downstream investment by LLPs in Indian Company / LLP under Automatic Route is also permitted provided sectors /activities are falling under automatic route and there are no FDI-linked performance conditions.
- ❑ Definition of Control is introduced – right to appoint majority of Designated Partners where such designated partners, with specific exclusion to others, have control over all the policies of the LLP
- ❑ Definition of Ownership is introduced – percentage of the investments in LLPs

Key issues

- Whether LLP can be capitalized on non-cash basis (against import of goods, services, etc.) in the same way as an Indian Company?
- With control and ownership criteria now defined, whether basis exists to deny FDI to LLP in all sectors / activities even with performance conditions?

Practical Issues - FDI Policy (con't)

Acquisition by NRIs on non-repatriation basis as per PN 7 of 2015

- NRI definition which includes PIOs amended to include Overseas Citizens of India (OCI) whose ambit is wider than PIOs.
- NRI Investments under FEMA 20 / Schedule 4 (Non-Repatriation basis) deemed to be domestic investment on par with residents

■ Benefits conferred to NRIs by PN 12 of 2015

- A Company, Trust and Partnership Firm incorporated outside India and owned and controlled by NRIs can invest in India with the special dispensation as available to NRIs under the FDI Policy
- Sectors relevant : Schedule Air Transport (NRI 100%/ FDI 49%); Construction-Development
- Similar Benefits to investments under Schedule 4 of FEMA 20 – Non Repatriation Basis

■ Key Issues

- Is this a change in policy to now allow erstwhile OCBs for FDI and other investments in India??
- How does one determine ownership and control in oversea Trust and Partnership?
- • Is conversion of NRI investment from Repatriable to Non-Repatriable basis possible?



Practical Issues - FDI Policy (con't)

Direct & Indirect Foreign Investment (IFI) by Resident Foreign citizens:

- FEMA rules generally do not apply based on citizenship but applies only when a transaction is between a resident and a non-resident. In case an Indian resident invests in an Indian company, FEMA Notification no. 20(R) also does not apply as the provisions are applicable only to PROIs.
- However, when it comes to downstream investments by IC, the regulations make a clear difference between Indian Company (IC) owned and controlled by resident Indian citizens or owned / controlled by non-residents.
- **Key Issues:**
 - If a foreign citizen who is resident in India is making direct investment in an Indian Company (i.e. first level IC), it appears that such a transaction shall not be regulated by FEMA (or FEMA Notification No. 20(R)). Is this the intention of the law and regulations?
 - If the IC is considered as Indirect Foreign Investment (as it is not owned and controlled by resident Indian citizen but by foreign citizen resident in India), then it gives rise to a situation where investment in IC is not regulated, whereas downstream investment is regulated. Is that the intention?



Practical Issues - FDI Policy (con't)

FDI for earning rent / income on lease of property:

- The Consolidated FDI Policy of 2016 clarifies in Paragraph 5.2.10 relating to FDI in Construction Development that FDI in Real Estate business is not permitted but earning of rent / income on lease of property will not amount to real estate business. It is reproduced for convenience as under:
“(i) It is clarified that FDI is not permitted in an entity which is engaged or proposes to engage in real estate business, construction of farm houses and trading in transferable development rights (TDRs).
“Real estate business” means dealing in land and immovable property with a view to earning profit there from and does not include development of townships, construction of residential/ commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships. Further, earning of rent/ income on lease of the property, not amounting to transfer, will not amount to real estate business.”
- **Key Issues:**
 - As against construction and subsequent lease of the property by the FDI recipient Indian Company, if FDI is instead made directly by FDI recipient Indian Company by way of investments in constructed property such as townships / residential / commercial premises, etc. with a view to lease the same in order to earn rent / income, would it be permissible under the FDI guidelines? The economic benefits to the country would be the same as local developers would have exit route of sale of constructed property to PROIs under FDI route.



Practical Issues - FDI Policy (con't)

Pricing of Compulsorily Convertible Debentures:

- As per the prevalent pricing guidelines of instruments under FDI, the pricing of shares / convertible debentures / preference shares should be decided / determined upfront at the time of issue of the instruments.
- The price for the convertible instruments can also be a determined based on the conversion formula which has to be determined / fixed upfront, however the price at the time of conversion should not be less than the fair value worked out, at the time of issuance of these instruments, in accordance with the extant FEMA regulations.
- **Key Issues:**
 - If the conversion formula is specified upfront as say e.g. “conversion shall be based on the price / earnings ratio at the time of conversion to be decided by the management subject to minimum issue price of Rs. 50/- per share being the fair value worked out at the time of issuance of these instruments”, would it be in compliance with the pricing guidelines?
 - The price for conversion into shares may be determined based on future profits. Hence till the FCDs are converted into shares, the exact foreign shareholding in the company cannot be determined. How can this be resolved when the Indian company is undertaking downstream investments in order to determine indirect foreign holding?

Practical Issues – Escrow mechanism in FDI transactions

Escrow mechanism has been permitted to facilitate FDI transactions in cases where parties to the share purchase agreement desire to complete the due diligence process before they finalize the agreement for the same and accordingly, there is a time lag between payment of purchase consideration and the receipt of the shares.

- AD Category – I banks have been given general permission to open and maintain non-interest bearing Escrow account in Indian Rupees in India on behalf of residents and non-residents, towards payment of share purchase consideration. Also, SEBI authorised Depository Participant are permitted to open and maintain, without approval of the Reserve Bank, Escrow account for securities.
- The detailed stipulations relating to opening of Escrow account are specified in Regulation 5(5) read with Schedule 5 of FEMA Ntf. 5(R)
- Regulation 5(5) of FEMA Ntf. 5(R) stipulates that “Resident or non-resident acquirers may, subject to the terms and conditions specified in Schedule 5, open, hold and maintain Escrow Account with Authorised Dealers in India”.
- **Key Issues:**
 - If the FDI transaction involves opening of Escrow account, is there a compulsion to open the same only in India?
 - Can a Cash Escrow account be opened abroad in which the Indian resident is not undertaking any transaction of remittance but it is only going to receive remittance in India as and when the transaction is finally consummated on completion of due diligence procedures?



Issues – PIO to OCI change

FEMA Notification No. 5(R) relating to Deposits by non-residents still continues with definition of “ Person of Indian origin” as amended in-line with OCI definition. Accordingly, as per FEMA 5(R):

‘Person of Indian Origin (PIO)’ means a person resident outside India who is a citizen of any country other than Bangladesh or Pakistan or such other country as may be specified by the Central Government, satisfying the following conditions:

- a) Who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or
- b) Who belonged to a territory that became part of India after the 15th day of August, 1947; or
- c) Who is a child or a grandchild or a great grandchild of a citizen of India or of a person referred to in clause (a) or (b); or
- d) Who is a spouse of foreign origin of a citizen of India or spouse of foreign origin of a person referred to in clause (a) or (b) or (c)

- Explanation: for the purpose of this sub-regulation, the expression ‘Person of Indian Origin’ includes an ‘Overseas Citizen of India’ cardholder within the meaning of Section 7(A) of the Citizenship Act, 1955.



Issues – PIO to OCI change (con't)

However, FEMA Notification No. 21 relating to Acquisition & Transfer of Immovable Property in India by NRIs & PIOs still continues with definition of " Person of Indian origin" without any amendment. Accordingly, as per FEMA 21:

A 'Person of Indian Origin' means an individual (not being a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan) who

- (i) at any time, held an Indian Passport or
- (ii) who or either of whose father or mother or whose grandfather or grandmother was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955).



Issues – PIO to OCI change (con't)

However, as per the latest definition mentioned in new FEMA 20(R) dt. 07.11.2017, a 'Non-resident Indian' (NRI) is a person resident outside India who is a citizen of India.

- OCI is now defined separately in new FEMA 20(R) as: 'Overseas Citizen of India (OCI)' means an individual resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955.
- Thus, with the latest amendment vide FEMA Ntf. 20(R), 'NRI' and 'OCI' are defined separately and there is no reference to 'PIO'; hence a PIO is required to take OCI card before undertaking the permitted investments.



Thank You
