

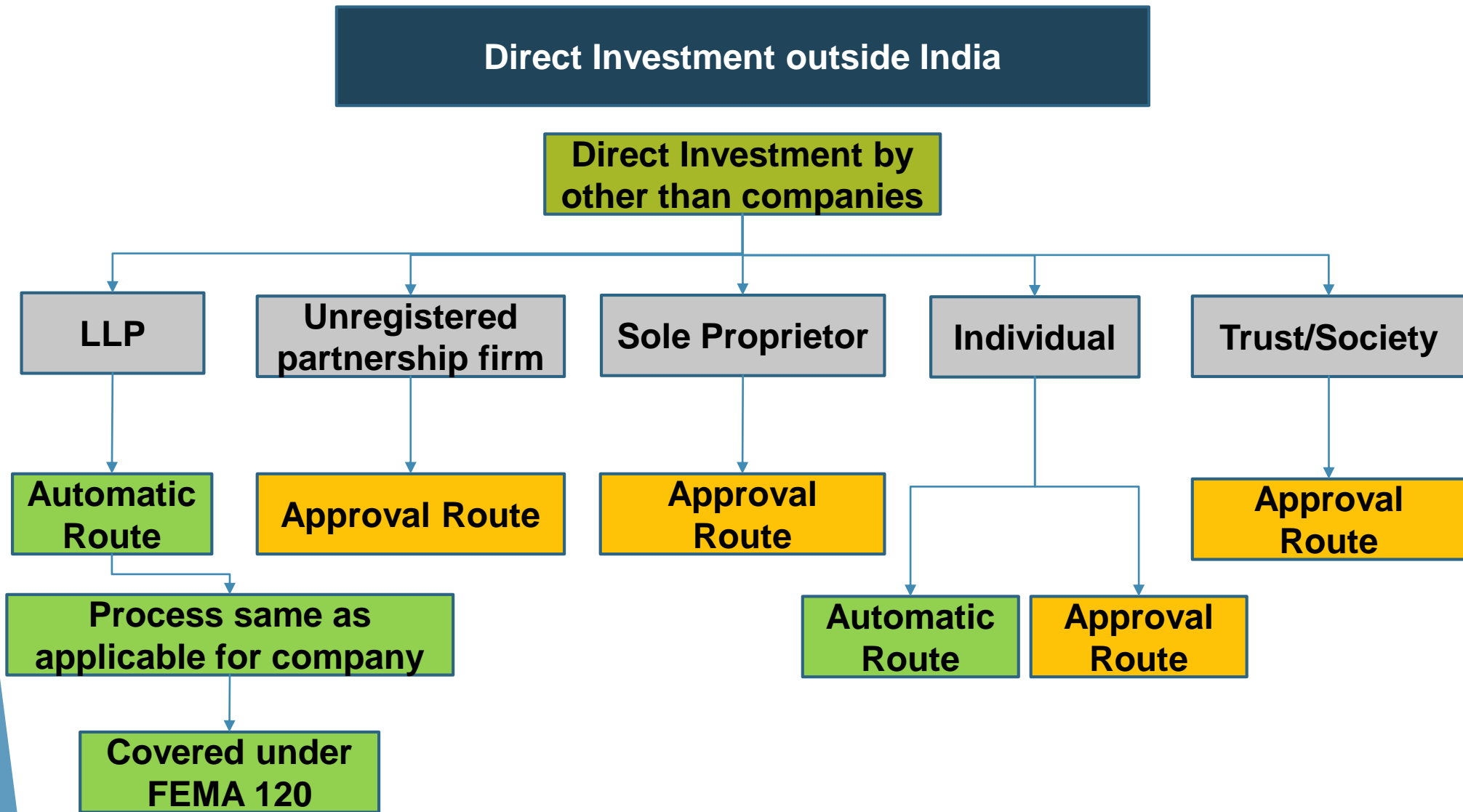
FEMA – Overseas Direct Investment – Part II

BGSS & Associates

Chartered Accountants

ODI by other than Companies

ODI – Excluding Companies (1/10)



ODI by Unregistered partnership firm and Sole proprietor (2/10) – Approval Route

- Covered under Approval route
- Subject to fulfillment of following conditions :

Condition:1	The proprietorship concern/unregistered partnership firm in India is classified as 'Status holder' as per FTP
Condition:2	The proprietorship concern/unregistered partnership firm in India is has proven track record i.e., the export outstanding does not exceed 10% of the average export realisation of the preceding three years and a consistently high export performance
Condition:3	The AD is satisfied that proprietorship concern/unregistered partnership firm in India is KYC compliant
Condition:4	The proprietorship concern/unregistered partnership firm in India has not come under the adverse notice of any government agency.
Condition:5	The amount of proposed investment (or financial commitment) outside India does not exceed 10 per cent of the average of last three years' export realisation or 200 per cent of the net owned funds of the proprietorship concern/ unregistered partnership firm in India, whichever is lower.

ODI by Sole Proprietor (3/10) – Approval Route

- Proprietary concern can accept shares of overseas company in lieu of fees due to it for professional services rendered
- Covered under Approval Route of RBI and subject to following conditions:

Condition:1

Value of the shares accepted from each overseas company shall not exceed 50% of fees receivable by the Indian concern from that company



Condition:2

Indian concern's shareholding in any one overseas company shall not exceed 10% of paid up capital of overseas company

ODI by Individuals (4/10)

Part I	Part II	Part III
In lieu of professional services/Director remuneration	In lieu of professional services/Director remuneration	Investment in equity and compulsorily convertible preference shares
Within LRS limit of USD 2,50,000	Beyond LRS limit of USD 2,50,000	Subject to Regulation 20A read with Schedule V
Automatic Route	Approval Route	
	Subject to terms and conditions given in Annex 1	

ODI by Individuals (5/10)

Key conditions for setting up or acquiring overseas WOS and JV:

1	JV/WOS should not be engaged in real estate business/banking business/financial services activity business
2	JV/WOS should be engaged in bonafide business activity
3	JV/WOS should not be located in countries identified by FATF as non-cooperative countries and territories or as notified by RBI prohibited
4	Individual not to be on RBI's exporters caution list or list of defaulters or under investigation by any investigation/enforcement agency or regulatory body
5	Investment should be within the LRS limit prescribed (currently, USD 2,50,000)
6	No step down subsidiary allowed to be acquired or set up by the JV/WOS
7	JV/WOS should be an operating entity only - Resident Individual cannot form an overseas SPV acting as mere IHC
8	Financial commitment restricted only to equity investment made by Individual
9	Valuation by Merchant banker/CA (Refer Annex:2)

ODI by Individuals (6/10)

▪ Disinvestment by resident individuals from JV/WOS:

- A resident individual, who has acquired/set up a JV/WOS may disinvest (partially or fully) by way of transfer/sale or by way of liquidation/merger of the JV/WOS
- Disinvestment **allowed after one year** from the date of making first remittance for setting up or acquiring the JV/WOS abroad
- **No write off allowed** in case of disinvestments by resident individuals
- Disinvestment proceeds to be repatriated to India **within 60 days** from date of disinvestment and the same to be reported to AD bank

ODI by Individuals (7/10)

Reporting requirements:

Key reporting

Individual to submit Part I of ODI Form

Investment to be reported by AD to RBI

Disinvestment proceeds to be repatriated to India and the same to be reported to AD

Disinvestment to be reported by AD to RBI in Part IV of ODI Form

Time line

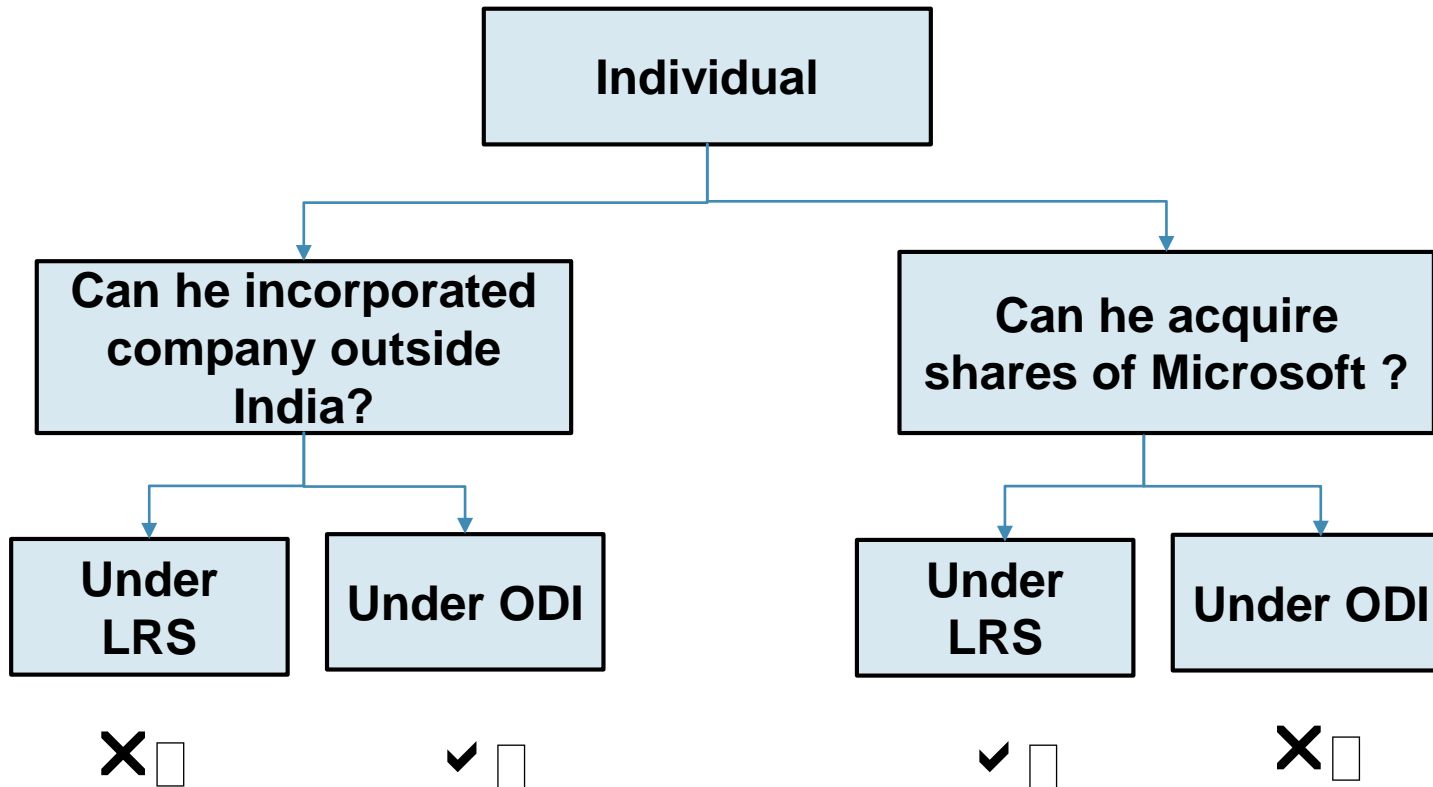
Within 30 days of making remittance

Within 30 days of making the remittance

Within 60 days from the date of disinvestment

Within 30 days of receipt of disinvestment proceeds

Test your knowledge (8/10)



ODI by Trust (9/10) – Approval Route

- Registered Trusts engaged in the manufacturing/educational sector; **AND**
- Have set up hospital(s) in India
- may invest in same sector in a JV / WOS outside India
- **with prior approval of RBI**

Eligibility criteria for Trust:

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

ODI by Society (10/10) – Approval Route

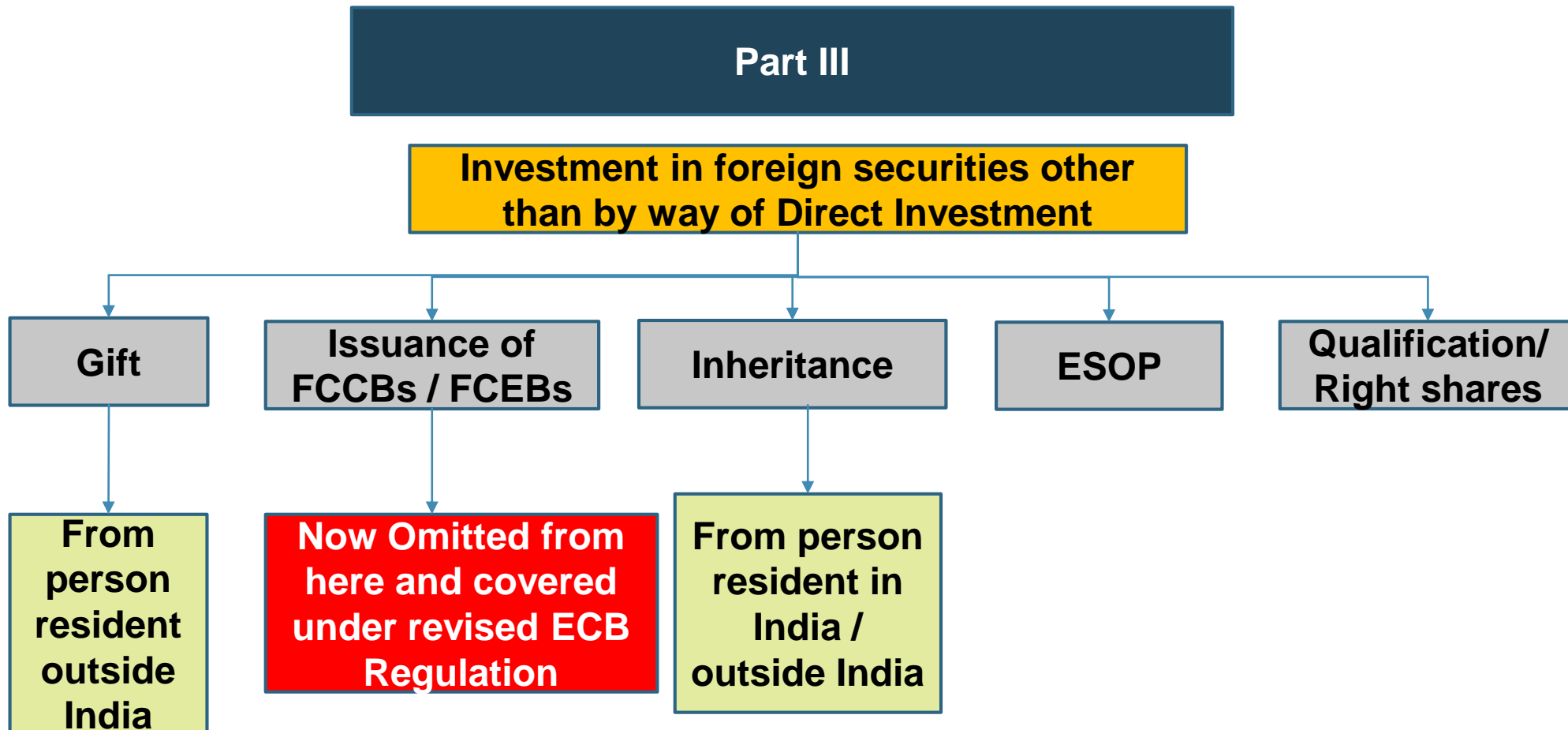
- Societies engaged in the manufacturing/educational sector; **AND**
- Have set up hospital(s) in India
- may invest in same sector in a JV / WOS outside India
- **with prior approval of RBI**

Eligibility criteria for Society:

- The Society should be registered under the Societies Registration Act, 1860;
- The Memorandum of Association and rules and regulations permit the Society to make the proposed investment which should also be approved by the governing body / council or a managing / executive committee;
- The AD bank is satisfied that the Society is KYC compliant and is engaged in a bonafide activity;
- The Society has been in existence at least for a period of three years;
- The Society has not come under the adverse notice of any Regulatory / Enforcement agency like the Directorate of Enforcement, CBI etc.

Investment in foreign securities

Investment in foreign securities (1/4)



Investment in foreign securities (4/4)

Inheritance

An individual resident in India may acquire foreign securities by way of inheritance from a person whether resident in or outside India.

Gift

An individual resident in India may acquire foreign securities by way of gift from a person resident outside India

‘Foreign securities’ defined u/s 2(o) of FEMA to mean any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency.

Investment in foreign securities (2/4)

ESOP

- An **individual resident in India** may acquire foreign securities issued by a company incorporated outside India under Cashless Employees Stock Option scheme:
 - **Provided** it does not involve any remittance from India.

Eligibility:

A person, resident in India, being an Individual, who is employee or director of:

- Indian office of a foreign entity
- Indian branch of foreign entity
- Subsidiary in India of foreign entity
- Subsidiary in India of Indian company in which foreign entity has direct or indirect equity holding

Conditions:

- Shares are offered by issuing company globally on uniform basis
- Annual return is submitted by Indian company

- A person resident in India may sell shares acquired through ESOP **provided** sale proceeds are repatriated within 90 days from date of sale of securities
- Foreign company issuing ESOP can also buyback the same from Indian person subject to certain conditions

Investment in foreign securities (3/4)

Qualification/Right share

- An person resident in India being an individual may:

Acquire qualification shares issued by an entity incorporated outside India for holding the post of a director in the entity

Condition 1: Extent of acquiring qualification shares is as per the law of host company where entity is located



Condition 2: Limit for acquiring such qualification shares shall be within LRS limit.

Acquire by way of right shares in a company incorporated outside India.

Right shares are being issued by virtue of holding shares.

ODI in different sectors

Investment in Agricultural operations

- **Eligibility** - A company incorporated in India or registered partnership firm
- **Nature of activities** - Agricultural operations including purchase of land incidental to such activity either directly or indirectly or through their overseas offices
- Subject to fulfillment of following conditions

Condition:1

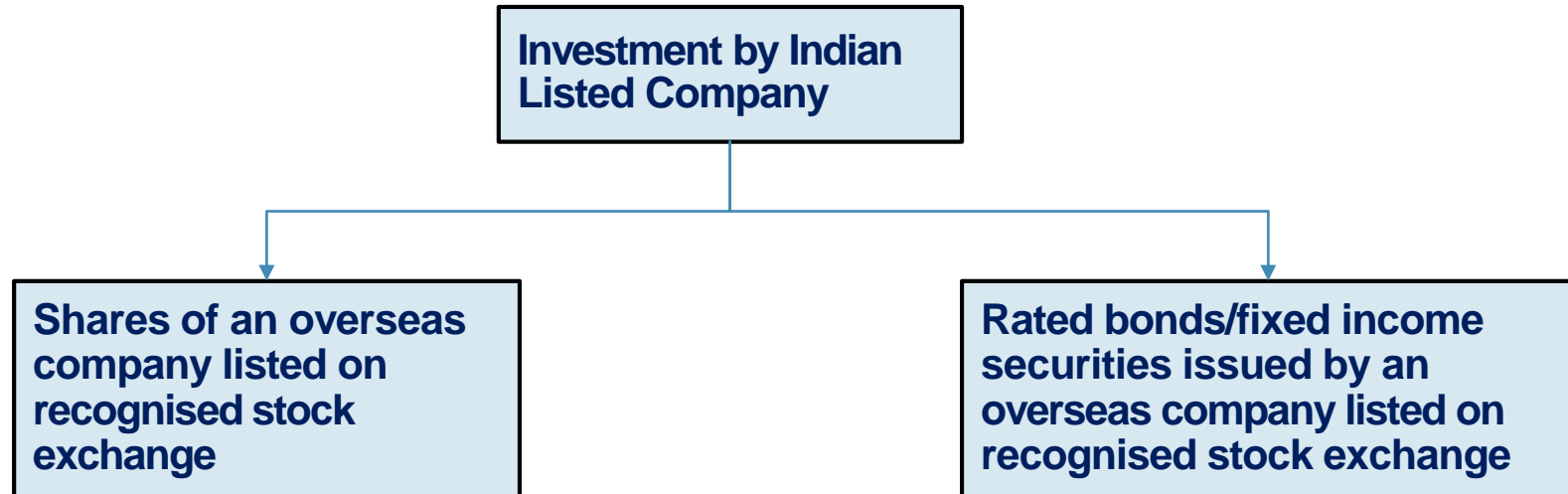
Indian party is eligible to make investment that the same is within permissible limit



Condition:2

The valuation of land should be certified by a certified valuer registered in the host country.

Portfolio Investment overseas by an Indian listed company



- Investment by Indian listed company not to exceed 50% of its net-worth as on the date of its last audited balance sheet.
- Every transaction relating to purchase and sale of shares of overseas company or bonds/securities to be routed through designated branch of an AD in India.

Investment by VCF and AIF (1/2)

- ODI by SEBI registered Venture Capital Funds ('VCF') and Alternative Investment Funds ('AIF') permitted subject to guidelines issued by SEBI
- Broad criteria stipulated for VCF and AIF to invest overseas as under –
 - ✓ AIFs and VCFs are permitted to invest in equity and equity linked instruments of off-shore venture capital undertakings ('Offshore VCUs'), subject to overall limit of USD 500 million (combined limit for AIFs and VCFs)
 - ✓ Offshore VCUs means foreign companies whose shares are not listed on any of the recognized stock exchange in India or abroad
 - ✓ Investment is permitted in Offshore VCUs which have an Indian connection (i.e. company which has a front office overseas, while back office operations are in India) up to 25% of the investible funds of the VCF / scheme of AIF

Investment by VCF and AIF (2/2)

- ✓ Prior approval of SEBI to be obtained. However, no separate permission from RBI would be required
- ✓ Allocation of investment limit will be done by SEBI on 'first come first serve' basis
- ✓ AIFs and VCFs shall not invest in JV/WOS while making overseas investments
- ✓ Reporting requirements prescribed for ODI by VCF and AIF

Acquiring the shares of SWIFT by a resident bank

- A bank in India, being licensed by the Reserve Bank under the provisions of the Banking Regulation Act, 1949, may acquire the shares of Society for Worldwide Interbank Financial Telecommunication (SWIFT) as per the by-laws of SWIFT, provided the bank has been permitted by the Reserve Bank for admission to the 'SWIFT User's Group in India' as member.

Investment by Mutual Fund

Indian Mutual funds registered with SEBI are permitted to invest within an overall cap of USD 7 billion in:

ADRs / GDRs of the Indian and foreign companies

Equity of overseas companies listed on recognized stock exchanges overseas

Initial and follow on public offerings for listing at recognized stock exchanges overseas

Foreign debt securities in the countries with fully convertible currencies

Money market instruments

Repos in the form of investment excluding borrowing of funds by mutual funds

Government securities

Derivatives traded on recognized stock exchanges overseas only for hedging

Short-term deposits with banks overseas

Units / securities issued by overseas Mutual Funds or Unit Trusts

ODI – Foreign Bank account, Guarantee and Reporting

Opening of foreign currency account abroad by an IP

Eligible Indian Party may open, hold and maintain Foreign Currency Account (FCA) abroad for the purpose of overseas direct investments subject to the following terms and conditions:

Conditions:

- The investments into the host country are required to be routed through a designated account.
- FCA shall be opened, held and maintained as per the regulation of the host country.
- The remittances sent to the FCA by the Indian party should be utilized only for making overseas direct investment into the JV / WOS abroad.
- Any amount received in the account by way of dividend and / or other entitlements from the subsidiary shall be repatriated to India **within 30 days** from the date of credit.
- The Indian Party should submit the details of debits and credits in the FCA on yearly basis to the designated AD bank.

FCA so opened shall be closed immediately or within 30 days from the date of disinvestment from JV/WOS.

Guarantee to JV/WOS by Indian party (1/3)

Permissible guarantee by Indian party

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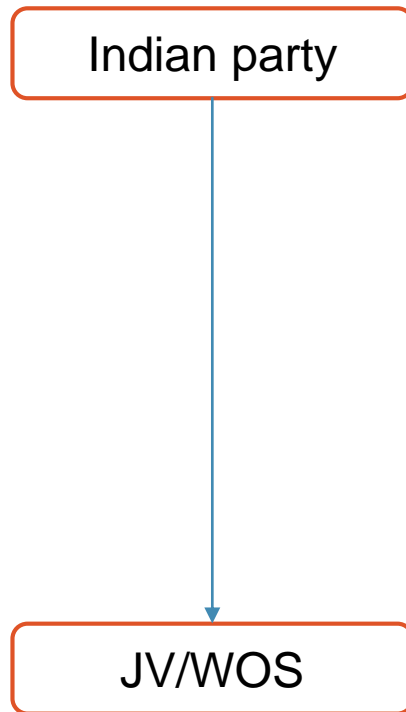
Under automatic route

- **To or on behalf of overseas JV/WOS:**
 - ✓ Provided the Indian Party has made investment by way of contribution to equity capital of JV/WOS
 - ✓ CCPS to be treated at par with equity shares and Indian party allowed to undertake financial commitment based on contribution to JV by way of CCPS
- **On behalf of its first generation step down operating company**

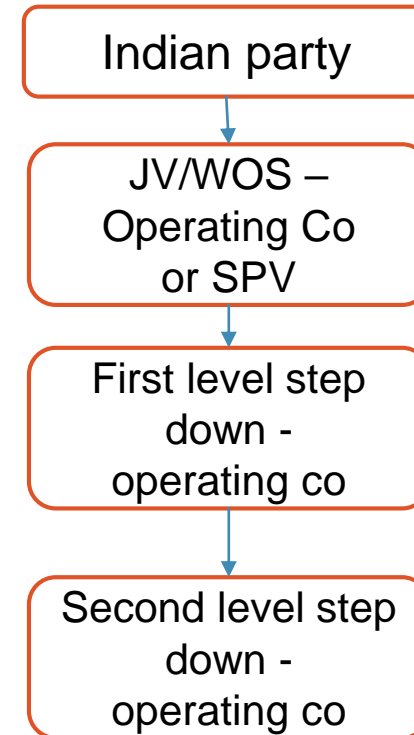
Under approval route

- **On behalf of second level or subsequent level step down operating subsidiaries:**
 - ✓ Provided the Indian Party holds 51% or more stake in overseas subsidiary for which such guarantee is intended to be issued

Guarantee to JV/WOS by Indian party (2/3)



Guarantee to JV/WOS permissible under automatic route – provided Indian Party has equity investment in JV/WOS



Guarantee to second level step down operating company permissible under approval route – provided Indian Party holds at least 51% in such company

Guarantee to JV/WOS by Indian party (3/3)



Guarantee to first level step down operating company permissible under automatic route – only if it is an operating company

Rollover of guarantee

- It has been decided not to treat the renewal / rollover of an existing / original guarantee, which is part of the total financial commitment of the Indian Party (IP), as a fresh financial commitment, provided that:

Conditions:

- The existing / original guarantee was issued in terms of the then extant / prevailing FEMA guidelines;
- There is no change in the end use of the guarantee;
- There is no change in any of the terms & conditions, including the amount of the guarantee except the validity period;
- The reporting of the rolled over guarantee would be done in Form ODI - Part I; and
- If the Indian Party is under investigation by any investigation / enforcement agency or regulatory body, the concerned agency / body shall be kept informed about the same.

However if above conditions are not fulfilled then IP shall obtain prior approval of RBI for rollover / renewal of existing guarantee.

Reporting requirements

- Form ODI is divided into following parts:

Part I: Application for allotment of Unique Identification Number (UIN) and reporting of Remittances / Transactions:

Section A – Details of the IP / RI.
Section B – Capital Structure and other details of JV/ WOS/ SDS.
Section C - Details of Transaction/ Remittance/ Financial Commitment of IP/ RI.
Section D – Declaration by the IP/ RI.
Section E – Certificate by the statutory auditors of the IP/ self-certification by RI.

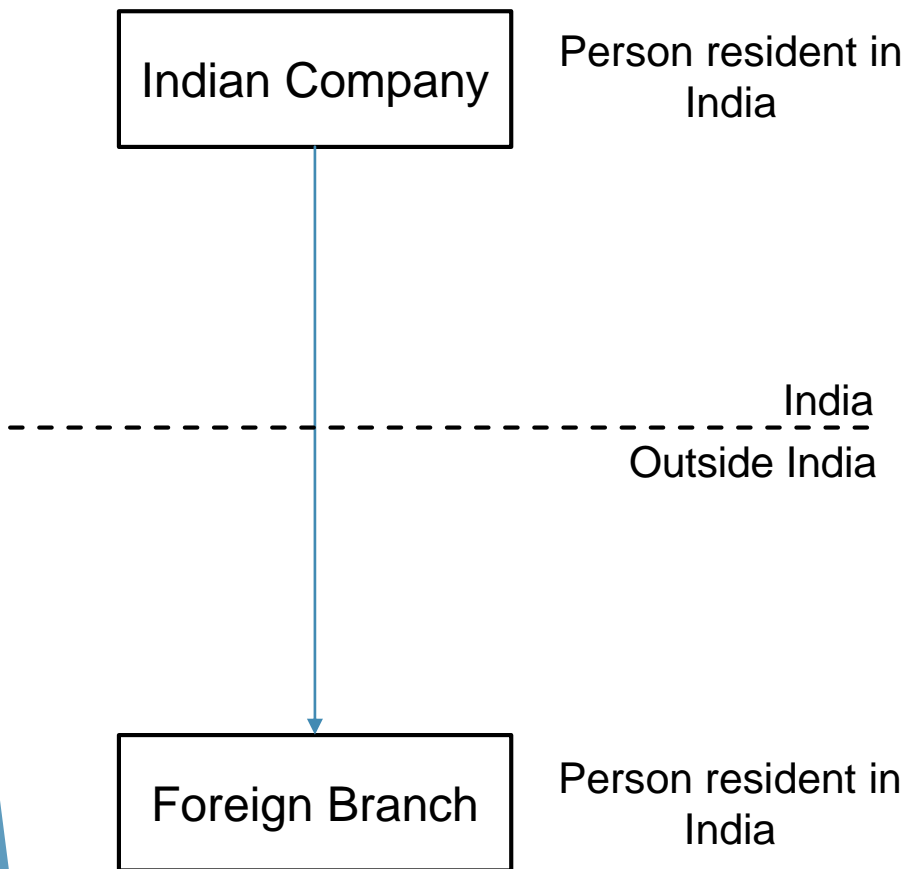
**Part II:
Annual
Performance
Report (APR)**

Part III: Report on Disinvestment by way of:

- Closure / Voluntary Liquidation / Winding up/ Merger/ Amalgamation of overseas JV / WOS;
- Sale/ Transfer of the shares of the overseas JV/ WOS to another eligible resident or non-resident;
- Closure / Voluntary Liquidation / Winding up/ Merger/ Amalgamation of IP; and
- Buy back of shares by the overseas JV/ WOS of the IP / RI.

Establishment of overseas branch

Establishment of branch office overseas (1/3)



- An office, branch or agency outside India owned or controlled by a person resident in India – covered within the purview of definition of 'person resident in India' under section 2(v) of FEMA
- Transaction between Indian company (Head Office) and foreign branch to be regarded as transaction between two Indian residents
- No specific regulations under FEMA for setting up such branch office

Establishment of branch office overseas (2/3)

- Eligibility - A firm or company or body corporate registered or incorporated in India may open, hold and maintain **in name of its branch, a foreign currency account with bank outside India**
- Purpose - Normal business operations of branch
- Funding - Remittance from India
- Funding limits:

Initial expenses

- ✓ Higher of 15% of average annual sales during last 2 years or up to 25% of net worth

Recurring expenses

- ✓ 10% of average annual sales/income or turnover during last 2 financial years

- **Account to be closed:**
 - ✓ if overseas branch/office is not set up within 6 months of opening account; or
 - ✓ Within 1 month of closure of overseas branch/office; or
 - ✓ Where no representative is posted for 6 months

Establishment of branch office overseas (3/3)

- Limits for remittance to account of branch not to apply where –
 - ✓ Remittance is made out of funds held in EEFC account of Indian entity;
 - ✓ Overseas branch/office is set up or representative posted by 100% EOU or unit in EPZ or HTPI or in STPI within 2 years of establishment of Unit
- Transfer or acquisition of immovable property outside India (other than by way of lease not exceeding 5 years) by branch will be subject to FEMA (Acquisition and Transfer of Immovable Property outside India), Regulations, 2000

Case Studies

Case study (1/11)

Question:

Can an individual acquire shares of Apple Inc. as portfolio investment ?

Answer:

Yes, individual can acquire shares but subject to LRS limit.



Case study (2/11)

Question:

Can an individual incorporate company outside India under LRS Route ?

Answer:

No, an individual cannot incorporate a company outside India under LRS Route but can incorporate only by following process given under Schedule V of FEMA 120

Case study (3/11)

Question:

Can an individual receive shares in form of gifts of foreign company from a person resident in India?

Answer:

No, an individual cannot receive shares of foreign company from a person resident in India.

Case study (4/11)

Question:

Can an individual receive agricultural land in inheritance from a person resident outside India?

Answer:

Yes, an individual can receive agricultural land from a person resident outside India.

Case study (5/11)



Question:

Can Mr. Mukesh Ambani acquire shares of Bank of America in his capacity as Director?

Answer:

Yes, Reserve Bank has given General Permission to a resident individual to acquire foreign securities to the extent of the minimum number of qualification shares required to be held for holding the post of Director. Accordingly Mr. Mukesh Ambani can acquire shares of Bank of America but should be subject to applicable LRS limit

Case study (6/11)

Question:

Can Indian listed company invest overseas other than by way of direct investment?

Answer:

Yes, **listed Indian companies** can invest up to 50% of their net worth as on the date of the last audited Balance Sheet in listed overseas companies.

Case study (7/11)

Question:

Can an individual remit USD 2,50,000 each in the capacity of both individual and sole proprietor ?

Answer:

There is no legal distinction between the individual / owner of sole proprietorship business. Hence, if an individual in his own capacity remits USD 250,000 in a financial year under LRS, he cannot remit another USD 250,000 in the capacity of owner of the sole proprietorship business as there is no legal distinction.

Case study (8/11)

Brief Facts

- An Indian company is under investigation by Department of Revenue Intelligence and a show cause notice was issued in this regard;
- Indian Company wanted to incorporate a company in Dubai and accordingly made remittance under Automatic Route subject to permissible limits of 400% of net worth
- Is the above remittance permissible under Automatic Route

Answer:

No, the same is not permitted under Automatic Route as the company is under investigation. Hence, ODI is permissible only after obtaining specific approval of RBI

Case study (9/11)

Question:

Can an individual acquire agricultural land overseas?

Answer:

No, he is not permitted to acquire the same.

Case study (10/11)

Question:

Can an individual purchase convertible debentures of an overseas startup in which he is a director?

Answer:

No, an individual cannot acquire convertible debentures of an overseas startup in which he is a director under FEMA 120. Further, investment through LRS is also not permissible where individual has management role

Question:

Further can he acquire the same if he already holds equity in the same company?

Answer:

No as FEMA 120 allows only investment through equity shares & convertible preference shares

Case study (11/11)

Question:

Can an individual incorporate JV/WOS which is a holding company ?

Answer:

No, an individual cannot incorporate JV/WOS overseas which is non-operating. Only operating companies are allowed to be incorporated under FEMA 120

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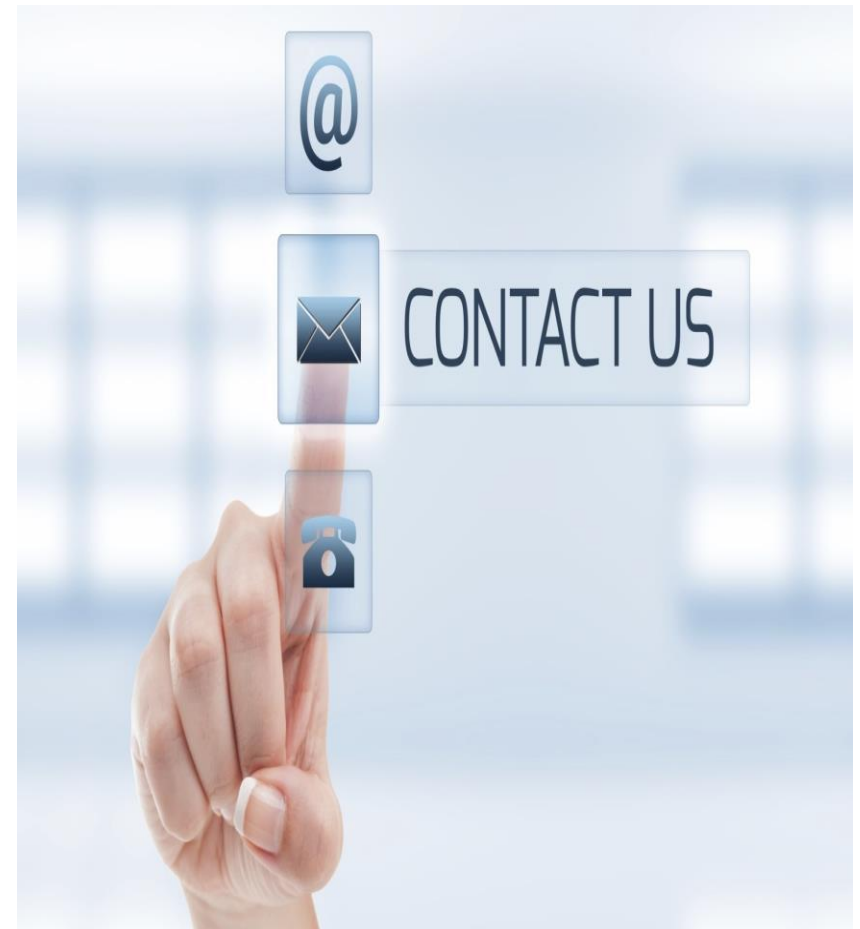
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Thank You

The background features abstract geometric shapes, primarily triangles, in various shades of blue and green. These shapes overlap and intersect, creating a dynamic, layered effect. The colors range from light, airy blues to deeper, more saturated blues and greens, with some areas appearing as darker, more complex intersections.

Annex 1

RBI considers following parameters before granting approval:

- Credentials, net worth and nature of profession of individual;
- Extent of forex earnings/balances in EEFC and RFC A/c;
- Financial and business track record of foreign entity;
- Potential for forex inflow to country;
- Other likely benefits to country.

Annex 2

Valuation of investment in shares of existing company :

Particulars	Valuation by
If investment exceeds USD 5 mn	<ul style="list-style-type: none">• Category I Merchant Banker registered with SEBI; or• Investment banker / Merchant banker outside India registered with appropriate authority in the host Country
In all other cases	<ul style="list-style-type: none">• Chartered Accountant; or• Certified Public Accountant
Investment by way of swap of shares	<ul style="list-style-type: none">• Category I Merchant Banker registered with SEBI; or• Investment banker / Merchant banker outside India registered with appropriate authority in the host Country