

List of Amendments/Additions

Sr.no	Chapter	Topic	Remarks	Page no.
1.	FEMA	Foreign Exchange Management (Overseas Investment) Rules, 2022 and its 5 schedules and Foreign Exchange Management (Overseas Investment) Regulations, 2022	Major addition	1-23
2.	FCRA	Section 32 ,Rule 20	Minor	23-24
3.	IBC	Changes in rule and regulations	Minor	25
4.	Directors	Rule 8,10,6 (Appointment and Qualification of Directors) Rules, 2014	Minor	25-26

1. FEMA

**(i) Foreign Exchange Management (Overseas Investment) Rules, 2022**

Vide Notification G.S.R. 646(E) dated **22 August 2022**, **through Ministry of Finance**, and in **supersession** of the

- Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 and
- Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015

**Important definitions (Rule 2)**

**“foreign entity”** means an **entity formed or registered or incorporated outside India**, including International Financial Services Centre that has **limited liability**:

**Provided that the restriction of limited liability shall not apply to an entity with core activity in a strategic sector; (E.g., green energy or natural resources).**

**“host country”** or **“host jurisdiction”** means the country or jurisdiction, including the International Financial Services Centre, in which the foreign entity is formed, registered or incorporated, as the case may be;

**“Indian entity” means–**

- (i) a **company** defined under the Companies Act, 2013
- (ii) a **body corporate** incorporated by any law
- (iii) a **Limited Liability Partnership** duly formed under the LLP Act, 2008 and
- (iv) a **partnership firm** registered under the Indian Partnership Act, 1932

**“Overseas Investment” or “OI”** means **financial commitment and Overseas Portfolio Investment by a person resident in India;**

**“Financial commitment”** means the aggregate amount of investment made by a person resident in India by way of

- i. **Overseas Direct Investment (ODI)**
- ii. **debt other than Overseas Portfolio Investment (OPI)** in a foreign entity or entities in which the Overseas Direct Investment is made and
- iii. **the non-funded based facilities (eg. Guarantees)** extended by such person to or on behalf of such foreign entity or entities;

**“Overseas Portfolio Investment” or “OPI”** means **investment, other than ODI**, in foreign securities, but not in any unlisted debt instruments or any security issued by a person resident in India who is not in an IFSC:

Provided that OPI by a person resident in India **in the equity capital of a listed entity**, even after its delisting shall continue to be treated as OPI until any further investment is made in the entity.

**“Overseas Direct Investment” or “ODI”** means investment

- i. by way of **acquisition of unlisted equity capital** of a foreign entity, or
- ii. **subscription** as a part of the memorandum of association of a foreign entity, or
- iii. **investment in 10 % or more of the paid-up equity capital of a listed foreign entity** or
- iv. **investment with control where investment is less than 10% of the paid-up equity capital of a listed foreign entity;**

Explanation.– For the purposes of this clause, where an investment by a person resident in India in the equity capital of a foreign entity is classified as ODI, such investment shall continue to be treated as ODI even if the investment falls to a level below ten per cent. of the paid-up equity capital or such person loses control in the foreign entity;

**ODI vs OPI (investment by way of equity capital)**

	Listed Entity		Unlisted Entity
<b>% Stake</b>	Control	No Control	(irrespective of control & % stake)
<b>&lt; 10%</b>	<b>ODI</b>	<b>OPI</b>	<b>ODI</b>
<b>&gt;10%</b>	<b>ODI</b>	<b>ODI</b>	<b>ODI</b>

**“net worth”** shall have the same meaning as assigned to it in clause (57) of section 2 of the Companies Act, 2013.

“net worth” means the aggregate value of the paid-up share capital and all reserves created out of the profits, securities premium account and debit or credit balance of profit and loss account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation

**“control”** means the **right to appoint majority of the directors** or to **control management or policy decisions** exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders’ agreements or voting agreements that entitle them to ten per cent. or more of voting rights or in any other manner in the entity;

**“Subsidiary” or “step down subsidiary”** of a foreign entity means an entity in which the foreign entity has control;

**“strategic sector”** shall include **energy and natural resources sectors** such as oil, gas, coal, mineral ores, submarine cable system and start-ups and any other sector or sub-sector as deemed necessary by the Central Government;

### **Rule 3 - Administration of these Rules**

- (1) These rules shall be administered by **the Reserve Bank.**
- (2) The Reserve Bank may issue such directions, circulars, instructions and clarifications as it may deem necessary for the **effective implementation of the provisions of these rules**

### **Rule 4 - Non-applicability of these Rules (Important)**

**These rules and relevant regulations shall not apply to:**

- (a) **any investment made outside India by a financial institution in an IFSC;** (Gift City in Gujarat is IFSC)
- (b) **acquisition or transfer** of any investment outside India made,—
  - (i) out of **Resident Foreign Currency Account;** or
  - (ii) out of foreign currency resources held outside India by a person who is employed in India for a specific duration irrespective of length thereof or for a specific job or assignment, duration of **which does not exceed three years;** or
  - (iii) in accordance with section 6 (4) of the Act.

Note:- **Section 6(4)** – PRI may hold foreign currency, foreign security or Immovable Property situated o/s India provided that it was held by such person when he was PROI or inherited from a PROI.

**Rule 5 – Debt instruments and non-debt instruments**

The following shall be the debt instruments and non-debt instruments as determined by the Central Government under section 6(7) of the Act, namely:–

**(A) Debt instruments**

(i) Government bonds;

(ii) Corporate Bonds

(iii) all tranches (pieces) of securitisation structure which are not equity tranche

(iv) borrowings by firms through loans

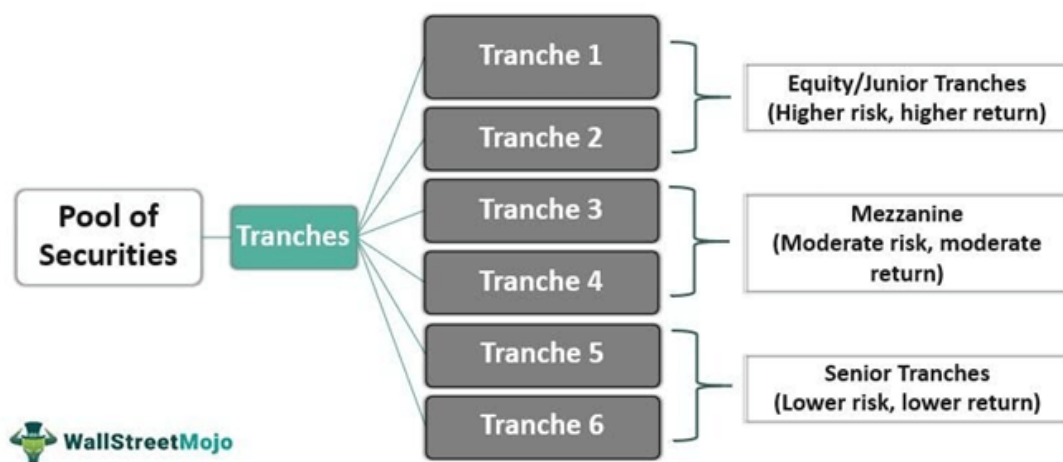
(v) depository receipts whose underlying securities are debt securities

**(B) Non-Debt instruments**

- (i) **all investments in equity** in incorporated entities (public, private, listed and unlisted);
- (ii) capital participation in **LLP**;
- (iii) all instruments of investment as recognized in the **Foreign Direct Investment policy** from time to time;
- (iv) investment in **units of Alternative Investment Funds and Real Estate Investment Trust and Infrastructure Investment Trusts**;
- (v) investment in units of **mutual funds and Exchange-Traded Fund** which invest more than 50 % in equity;
- (vi) the junior-most layer (i.e. **equity tranche**) of securitisation structure;
- (vii) acquisition, sale or dealing directly in **immovable property**;
- (viii) contribution to **trusts**; and
- (ix) **depository receipts issued against equity instruments**;

Note- Tranches refer to the segmentation of a pool of securities with varying degrees of risks, rewards, and maturities to appeal to investors.

## How Does Tranches Work?



### **Rule 6 – Continuity of existing investments**

Any investment or financial commitment made outside India as per FEMA Rules and Regulations and held as on date of publication of this Rule in Official Gazette – **Deemed to be in compliance of this Rule.**

### **Rule 7 –Rights issue and bonus shares**

(i) Any PRI who has acquired & continues to hold equity of foreign entity (as per Rules & Regulation) may:

- Invest in equity capital issue by such entity as rights issue, or
- May be granted bonus subject to terms and conditions of these rules.

(ii) PRI referred above **may renounce such rights in favor of PRI or PROI.**

### **Rule 8 –Prohibition on investment outside India**

Save as otherwise provided in Act, Rules or Regulation, **no PRI shall make or transfer investment or financial commitments outside India.**

### **Rule 9 – Overseas Investment**

1. Any investment made outside India by a PRI shall be made in a **foreign entity** engaged in **bona fide business activity**, directly or through step down subsidiary or Special Purpose Vehicle subject to limits and conditions of these rules and regulations.

Provided that the Overseas Investment or transfer thereof (including swap) of securities in foreign entities incorporated in **Pakistan or other CG notified jurisdiction requires prior approval of CG.**

2. Notwithstanding these Rules and Regulations:

- i. CG may, on application made to it through RBI, permit financial commitments in strategic sectors or geographics, **above the limits subject to terms & Conditions.**
- ii. RBI may, on application made to it through designated AD Bank, permit a PRI to make or transfer investment or financial commitment outside India subject to terms and conditions.

**Provided that the Overseas Investment by PRI shall not be made in foreign entity located in country as may be decided by CG.**

3. RBI may, in consultation with CG,

- Stipulate ceiling for aggregate outflows in a FY on account of financial commitment or Overseas Portfolio Investment;
- Stipulate ceiling beyond which amount of Financial commitment (not OI) by a PRI in a FY shall require prior approval of RBI.

#### **Rule 10 – No Objection Certificate (Important)**

(1) Any person resident in India who,–

- (i) has an account appearing as a **non-performing asset**; or
- (ii) is classified as a **wilful defaulter by any bank**; or
- (iii) is **under investigation** by a financial service regulator or by investigative agencies in India, namely, the CBI or Directorate of Enforcement or SFIO ,

shall, before making any financial commitment or undertaking disinvestment under these rules or Regulations, 2022, obtain a **No Objection Certificate from the lender bank or regulatory body or investigative agency** by making an application in writing.

Provided that where the lender bank or regulatory body or investigative agency concerned **fails to furnish the certificate within 60 days from the date of receipt of such application, it may be presumed that there was no objection to the proposed transaction.**

(2) The No Objection Certificate issued under sub-rule (1) shall be addressed by the lender bank or regulatory body or investigative agency concerned **to the designated AD bank with an endorsement to the applicant.**

#### **Rule 11 to 15 has been discussed in Schedule I to V.**

#### **Rule 16 – Pricing Guidelines:**

1. Unless otherwise provided herein, the issue or transfer of equity capital of a foreign entity-
  - from PROI or PRI to a PRI who is eligible to make such investment, or
  - from a PRI to a PROI

shall be subject to a price arrived on **Arm's Length basis (ALP).**

2. In such transaction, AD bank shall ensure compliance with ALP taking into consideration the valuation as per internationally accepted method.

**Rule 17 – Transfer or Liquidation:**

1. Unless otherwise provided in these rules, PRI holding equity capital as per these rules, **may transfer such investments** as per the Regulations.

2. PRI may transfer equity capital by way of sale to a “Eligible PRI” who can make such investment under these rules or to PROI.

3. In case such **transfer is on account of merger, amalgamation or demerger or buyback**, such transfer or liquidation shall have **approval** of competent authority as per laws of India or host country.

**4. Where the disinvestment by PRI pertains to ODI: (Important)**

i. Transferor, in case of full disinvestment other than by way of liquidation, **shall not have any dues outstanding for receipt from foreign entity** (as an investor in equity or debt)

ii. Transferor must have **stayed invested for at least 1 year** from date of making ODI

**Provided that, above condition shall not applicable in case of:**

a. merger, demerger or amalgamation between two or more foreign entities that are **wholly owned by the Indian entity or**

b. where there is **no change or dilution** in aggregate holding of Indian entity in the merged or demerged or amalgamated entity.

5. The holding of any investment or transfer thereof **shall not be permitted if initial investment was not permitted under the Act.**

**Rule 18 – Restructuring:**

PRI who made ODI in a foreign entity **may permit restructuring of balance sheet** by such entity:

which has been **incurring losses for previous 2 years** as evidenced by last audited BS subject to compliance with reporting, documentation requirements, and subject to **diminution in the total value of outstanding dues** towards such PRI on accounts of investment in equity or debt after such restructuring **not exceeding the proportionate amount of accumulated losses.**

**Example-** Mr. Aman has invested in shares of DFT, a foreign entity in UK. The foreign entity is not performing good and it has incurred heavy losses for the past 3 years. He has subscribed to 15% equity in the entity. The losses stood at USD 20 million. Comment whether the Foreign entity is eligible for restructuring. If yes, what would be the maximum diminution in the investment value of Mr. Aman ?

**Answer-** The foreign entity can go for restructuring as it has been **incurring losses for previous 2 years subject to** the maximum diminution in the total value of outstanding dues towards such

PRI on accounts of investment in equity or debt after such restructuring not exceeding the proportionate amount of accumulated losses.

Here, the losses of foreign entity stood at USD 20 million ,then maximum diminution in value would be the proportionate share of losses of Mr.Aman i.e.  $15\% * \text{USD } 20 \text{ million} = \text{USD } 3 \text{ million}$ .

**Requirement of certification of diminution in value:**

In case where the **original investment is more than USD 10 million** or **where amount of diminution exceeds 20% of total value of the outstanding dues towards the Indian entity or investor**, the diminution in value shall be duly certified on an ALP by:

- Registered valuer under Companies Act, 2013 or
- Corresponding valuer registered with regulatory authority in host jurisdiction, or
- Certified Public Accountant in host jurisdiction.

Provided further that the **certificate dated not more than six months** before the date of the transaction shall be submitted to the designated AD bank.

**Rule 19 – Restrictions and prohibitions**

1. Unless otherwise provided in the Act or these rules, **no person resident in India shall make ODI in a foreign entity engaged in—**

- (a) real estate activity;
- (b) gambling in any form; and
- (c) dealing with financial products linked to the Indian rupee without specific approval of the Reserve Bank.

**Explanation.**– For the purposes of this sub-rule, the expression "real estate activity" means buying and selling of real estate or trading in Transferable Development Rights **but does not include the development of townships, construction of residential or commercial premises, roads or bridges for selling or leasing.**

**2. Any ODI in start-ups recognized under laws of host country shall be made by an:**

- Indian entity - Only from internal accruals whether from Indian entity or group or associate cos. in India
- Resident individuals – from own funds of such individuals

**3. Restriction on layers of investment-** No PRI shall make financial commitment in foreign entity that has invested or invests into India, at the time of making it or any time, thereafter, resulting in a structure **with more than 2 layers of subsidiaries. (Round Tripping)**

**Provided that such restriction shall not apply to the following classes of companies -**

- (a) a banking company
- (b) a non-banking financial company as and considered as systematically important non-banking financial company by the Reserve Bank;



- (c) an insurance company
- (d) a Government company

**Rule 20 – Requirements to be specified by Reserve Bank**

Mode of payment, deferred payment of consideration, reporting, realisation and other requirement for OI by PRI shall be as per regulations made by RBI.

**Rule 21 – Restriction on acquisition or transfer of immovable property outside India.**

(1) Save as other provided in the Act, **no PRI shall acquire or transfer immovable property outside India without general or special permission of RBI.**

**Provided that above provision shall not apply to property:**

- (i) Held by PRI who is a national of a foreign state.
- (ii) Acquired by a PRI on or before 8th July 1947 and continued to be held by such person with permission of RBI
- (iii) Acquired by PRI on **lease not exceeding 5 years.**

**(2) Notwithstanding anything contained in sub-rule (1)–**

- (i) a PRI may acquire immovable property outside India **by way of inheritance or gift or purchase from a PRI who has acquired such property as per the foreign exchange provisions in force at the time of such acquisition;**
- (ii) a PRI may acquire immovable property outside India from PROI-**
  - (a) by way of **inheritance;**
  - (b) by way of purchase out of **foreign exchange held in RFC account;**
  - (c) by way of purchase out of the remittances sent under the **Liberalised Remittance Scheme instituted by the Reserve Bank:**

Provided that **such remittances under the LRS may be consolidated in respect of relatives** if such relatives, being persons resident in India, comply with the terms and conditions of the Scheme;

- (d) jointly with a relative who is a PROI ;
  - (e) out of the income or sale proceeds of the assets, other than ODI, acquired overseas under the provisions of the Act;
- (iii) **an Indian entity having an overseas office** may acquire immovable property outside India for the **business and residential purposes** of its staff, as per the directions issued by the Reserve Bank from time to time;

- (iv) a PRI who has acquired any immovable property outside India in accordance with the foreign exchange provisions in force at the time of such acquisition may—
- (a) transfer such property by way of **gift to a person resident in India** who is eligible to acquire such property under these rules or **by way of sale**;
  - (b) create a **charge on such property** in accordance with the Act or the rules or regulations.
- (3) The holding of any investment in immovable property or transfer thereof in any manner **shall not be permitted if the initial investment in immovable property was not permitted under the Act.**

**Rule 11 to 15 has been discussed in Schedule I to V**

Schedule no.	Heading	Rule
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**Schedule I Manner of making Overseas Direct Investment by Indian entity (Important)**

**1. Manner of making ODI.—**

- (1) An Indian entity may make ODI by way of **investment in equity capital** for the purpose of undertaking **bonafide business activity**.
- (2) The ODI may be made or held by way of,—
- (i) subscription as part of MOA or purchase of **equity capital, listed or unlisted**;
  - (ii) acquisition through **bidding or tender procedure**;
  - (iii) acquisition of equity capital by way **of rights issue or allotment of bonus shares**;
  - (iv) **capitalization** of any amount due towards the Indian entity from the foreign entity, the remittance of which is permitted under the Act or does not require prior permission of the Central Government or the Reserve Bank.
  - (v) **the swap of securities**;
  - (vi) **merger, demerger, amalgamation or any scheme of arrangement** as per the applicable laws in India or laws of the host country or the host jurisdiction, as the case may be.

**2. ODI in financial services activity:**

(1) **An Indian entity engaged in financial services activity in India may make ODI in a foreign entity engaged in such activity provided that the Indian entity:**

- (i) has posted **net profits during the last 3 FYs**
- (ii) is **registered with financial service regulator in India**
- (iii) **has obtained approval** from financial service regulators both in India and host country

(2) An Indian entity **not engaged in financial services activity in India** may make ODI in a foreign entity engaged in such activity, **except banking or insurance**, provided that the Indian entity has posted net profits during the last 3 FYs.

**Exception** - Provided that an Indian entity not engaged in insurance sector may make ODI in **general and health insurance** where such insurance business is supporting the core activity undertaken overseas by such an Indian entity.

**(3) If net profit condition above is not met from 2020-2021 to 2021-22 due to COVID, then exclude these periods.**

**3. Limit of financial commitment (FC):**

(1) Total FC by an **Indian entity in all foreign entities taken together** shall be **not exceed 400% of its Net worth** as on date of last audited FS or as directed by RBI in consultation with CG.

(2) **Total FC shall not include capitalisation of retained earnings (e.g., bonus) but include:**

- i. Utilisation of the amount raised by issue of ADRs or GDRs or stock swap.
- ii. Utilisation of proceeds from ECBs to the extent the corresponding pledge or creation of charge on asset to raise such borrowings has not already been included in limit.

**Note : Provided that FC made by Maharatna or Navratna or Miniratna or subsidiary of such PSUs in foreign entity outside India engaged in strategic sectors shall not be subject to above limits.**

**Illustration 1-**

ABC Limited incorporated in India has sufficient funds realized from a new investment scheme. Its CFO is planning to invest in foreign entity. ABC limited is an engaged in mutual fund services. Its profits and losses for the last 5 years –

Financial Year	Profits/Losses (₹ in lakhs)
2021-22	100
2020-21	(300)
2019-20	600
2018-19	525
2017-18	475

Advise as per the recent FEMA rules, Can he invest outside India or not ?

**Answer:**

**As per schedule 1 along with Rule 11 of FEMA (Overseas Investment) Rules, 2022**, an Indian entity engaged in financial services activity in India may make ODI in a foreign entity engaged in such activity provided that the Indian entity:

- (i) has posted net profits during the last 3 FYs
- (ii) is registered with financial service regulator in India
- (iii) has obtained approval from financial service regulators both in India and host country

If net profit condition above is not met from 2020-2021 to 2021-22 due to COVID, then exclude these periods.

**After excluding loss of 2020-21 as it is COVID period , past 3 years has profits ,hence ABC limited is eligible to invest outside India.**

### **Schedule II - Manner of making Overseas Portfolio Investment by Indian entity**

- An Indian entity may make OPI which shall not exceed **50% of net worth as on date of last audited balance sheet.**
- Listed Indian co. may make OPI including by way of reinvestment.
- An unlisted Indian entity may make OPI **only under clauses (iii), (iv), (v) and (vi) of sub-paragraph (2) of paragraph 1 of Schedule I as under**

- (iii) acquisition of equity capital by way **of rights issue or allotment of bonus shares;**
- (iv) **capitalization** of any amount due towards the Indian entity from the foreign entity, the remittance of which is permitted under the Act or does not require prior permission of the Central Government or the Reserve Bank.
- (v) **the swap of securities;**
- (vi) **merger, demerger, amalgamation or any scheme of arrangement** as per the applicable laws in India or laws of the host country or the host jurisdiction, as the case may be.

- An Indian entity can make total investment of 450% of NW (i.e., 400% in ODI & 50% in OPI).

### **Schedule III - Manner of making Overseas Investment by Resident Individual**

#### **1. Manner of making OI:**

- (1) Any resident individual may make ODI or OPI subject to overall ceiling under **LRS of RBI.**

(2) Resident individual may make or hold OI by way of:

(i) ODI in an operating foreign entity:

- **not engaged in financial service activity AND**
- where the resident individual has control, **such foreign entity does not have subsidiary or step-down subsidiary.**

**Author's Note- where the resident individual has no control, whether such foreign entity have subsidiary or step-down subsidiary or not, this condition would not be relevant for making ODI.**

(ii) OPI, including by way of reinvestment.

(iii) ODI or OPI, by way of:

- (a) **capitalisation**, of any amount due from the foreign entity the remittance of which is permitted under the Act or does not require prior permission of the Central Government or the Reserve Bank;

**Note- capitalisation, means conversion of any due amount (debt) into equity form.**

- (b) **swap of securities on account of a merger, demerger, amalgamation or liquidation;**

**(A security swap arrangement signifies issuance of a security in exchange for a share rather than remittance of cash consideration)**

- (c) acquisition of equity capital through **rights issue or allotment of bonus shares;**
- (d) **gift** as per the conditions laid down under this Schedule;
- (e) **inheritance;**
- (f) acquisition of **sweat equity shares;**
- (g) acquisition of **minimum qualification shares** issued for holding a management post in a foreign entity;
- (h) acquisition of **shares or interest under Employee Stock Ownership Plan** or Employee Benefits Scheme:

Note- Provided that ODI in respect of clauses (e), (f), (g) and (h) **may be made in a foreign entity whether or not such foreign entity is engaged in financial services activity or has subsidiary or step-down subsidiary where the resident individual has control;**

**Provided further that the acquisition of less than 10% of the equity capital, whether listed or unlisted, of a foreign entity without control under clauses (f), (g) and (h), shall be treated as OPI.**

Explanation.— For the purposes of this Schedule, a foreign entity will be considered to be engaged in the business of financial services activity if it undertakes an activity, which if carried

out by an entity in India, requires registration with or is regulated by a financial sector regulator in India.

**2. Acquisition of foreign securities by way of Gift or inheritance:**

(1) A resident individual may, without any limit, acquire foreign securities by way of inheritance from PRI is holding such securities as per this Act or from a PROI.

(2) A resident individual, without any limit, may acquire foreign securities by way of gift from a PRI who is a relative and holding such securities as per this Act.

(3) A resident individual may acquire foreign securities by way of gift from a PROI as per FCRA Act and Regulations made thereunder. (New FCRA limit of 10 Lakhs will apply)

Note-

Foreign securities by way of Gift or inheritance from	PRI	PROI
	No limit for inheritance.	<b>No inheritance allowed</b>
	No limit for gift from relative PRI.	Gift allowed subject to FCRA limit

**3. Acquisition of shares or interest under ESOP or Sweat Equity shares:**

(1) A resident individual, who is an employee or director of an:

- office in India or branch of an overseas entity or
- subsidiary in India of an overseas entity or
- Indian entity in which the overseas entity has direct or indirect equity holding

may acquire, without limit, shares under ESOPs or sweat equity shares offered by such overseas entity provided that **such ESOPs are being issued globally on uniform basis.**

(2) Notwithstanding above, a resident individual may acquire ESOPs under any scheme of CG.

**Note : “indirect equity holding” means indirect foreign equity holding through a special purpose vehicle or step-down subsidiary;**

**Example-** Mr Aman ,a resident individual who is a managing director of Daffodils limited in India which is wholly owned subsidiary of Daffodils US Inc. The company is planning to issue ESOP for all its employees in the coming months. Is Mr Aman eligible for ESOP from a foreign entity, if yes what would be the correct limit?

- a) Not eligible as he is working its subsidiary not in US Inc
- b) Eligible subject to LRS limit
- c) Eligible ,without any limit
- d) Eligible subject to limit of ESOP in US.

**Answer: c) Eligible ,without any limit**

**Schedule IV - Overseas Investment by person resident in India other than Indian entity and resident Individual**

**1. ODI by Registered trust or society**

Any person being a **registered trust, or a registered society engaged in the educational sectors**, or which **has set up hospitals in India may make ODI with prior approval of RBI subject to following conditions –**

- (i) **Foreign entity is engaged in same Sector** as that of the Indian trust or society,
- (ii) Trust or society should be in **existence for at least 3 FYs before the year of investment**
- (iii) Trust deed or MoA or Rules or bye-laws shall **permit proposed ODI**
- (iv) Such investment has **approval of trustees (trust) and governing body (society)**
- (v) In case the trust or society **requires special license** either from MHA, CG or local authority, **such license has been obtained and submitted to designated AD.**

**2. ODI by Mutual Funds (MFs), Venture Capital Fund (VCFs) or Alternative Investment Fund (AIFs)**

(1) A MF or VCF or AIF may acquire or transfer foreign security as per SEBI and subject to terms and conditions of RBI.

Provided that the aggregate limit of such investment is decided by RBI in consultation with CG.

Provided further that – Individual limits of such investment shall be as per SEBI.

(2) Every transaction of purchase or sale here shall be routed through designated AD bank

(3) **Investments by MF, VCFs and AIF to be treated as OPI.**

**3. Opening of Demat Accounts by SEBI approved clearing corporations of stock exchanges and clearing members**

Any person, being a SEBI approved clearing corporation of a stock exchange and its clearing members, **may acquire, hold, and transfer foreign securities**, offered as collateral by foreign portfolio investors and subject to SEBI, shall:

- (i) Open and maintain demat account with foreign depositories.
- (ii) Remit the proceeds arising due to such action, if any, and
- (iii) Liquidate such foreign securities and repatriate the proceeds thereof to India.

**4. Acquisition and transfer of foreign securities by domestic depositories:**

A domestic depository may acquire, hold and transfer foreign securities of a foreign entity, **being the underlying security to issue Indian Depository Receipts (IDRs) as** may be

authorized by such foreign entity or its overseas custodian bank and the person investing in IDRs may either sell or continue to hold foreign securities as per these regulations upon conversion of such depository receipts.

#### **5. Acquisition and transfer of foreign securities by AD Bank:**

An AD bank **including its overseas branch** may acquire or transfer foreign securities in accordance with the terms of the host country in the normal course of its banking business.

### **Schedule V - Overseas Investment in IFSC by person resident in India**

1. Subject to these rules and regulations, PRI may make OI in IFSC in India within limit.
2. A PRI may make OI in an IFSC in manner laid down in Sch I to IV provided that:
  - (i) In case of an ODI made in IFSC, approval by concerned financial service regulator shall be decided **within 45 days from date of application, failing which it would be deemed approval.**
  - (ii) An Indian entity not engaged in financial service activity in India, making ODI in foreign entity, **except banking and insurance**, who does not meet net profit condition, **may make ODI in an IFSC.**
  - (iii) PRI may make contribution to an investment fund or vehicle set up in an IFSC as an OPI.
  - (iv) Resident individual may make ODI in foreign entity including an entity engaged in financial services activity, (except in banking and insurance), in IFSC if such entity does not have subsidiary or step-down subsidiary outside IFSC where the resident individual has control in the foreign entity.
3. **Recognized stock exchange in IFSC shall be treated as RSE outside India for these rules.**

#### **(ii) Foreign Exchange Management (Overseas Investment) Regulations, 2022**

Issued by RBI through Notification No. FEMA 400/2022-RB, dated **22nd August 2022**

#### **Regulation 3 - Financial commitment by Indian entity by modes other than equity capital**

The Indian entity may lend or invest in **any debt instrument** issued by a foreign entity or extend **non-fund based commitment** to or on behalf of a foreign entity **including overseas step down subsidiaries of such Indian entity.**



subject to the following conditions and within the financial commitment limit as prescribed in the Foreign Exchange Management (Overseas Investment) **Rules, 2022**:—

- i. the Indian entity is **eligible to make ODI**;
- ii. the Indian entity has made **ODI in the foreign entity**;
- iii. the Indian entity has **acquired control in such foreign entity** at the time of making such financial commitment.

**Types of Financial Commitments that will be considered for the limit**

**Regulation 4- FC by Indian Entity by way of Debt**

**Regulation 5-FC by way of Guarantee**

**Regulation 6-FC by way of Pledge or Charge**

**Regulation 7-Acquisition or Transfer by way of Deferred Payment**

**Regulation 4- Financial commitment by Indian entity by way of debt**

**An Indian entity may lend or invest in any debt instruments issued by a foreign entity**

- ❖ subject to the condition that such loans are **duly backed by a loan agreement**
- ❖ where the **rate of interest shall be charged on an arm's length basis**.

**Regulation 5- Financial commitment by way of guarantee**

(1) The following guarantees may be issued **to or on behalf of the foreign entity or any of its step-down subsidiary** in which the **Indian entity has acquired control** through the foreign entity:

- (i) **corporate or performance guarantee** by such Indian entity;
- (ii) corporate or performance guarantee by **a group company** of such Indian entity in India,
  - ❖ being a **holding company** (which holds at least 51 % stake in the Indian entity) or
  - ❖ a **subsidiary company** (in which the Indian entity holds at least 51 % stake) or
  - ❖ a **promoter group company**, which is a body corporate;
- (iii) **personal guarantee by the resident individual promoter** of such an Indian entity;
- (iv) **bank guarantee**, which is backed by a **counter-guarantee or collateral** by the Indian entity or its group company as above, and issued, **by a bank in India**.

**Important note w.r.t counting for limits:**

**Where the guarantee is extended by**

- ❖ **a group company:** it shall be counted towards the utilisation of its financial commitment limit independently; and
  - ❖ **in case of a resident individual promoter:** the same shall be counted towards the **financial commitment limit of the Indian entity:**
- **If the commitment is extended by a group company:** any fund-based exposure (actual debt) to or from the Indian entity **shall be deducted from the net worth of such group company** for computing its financial commitment limit:
- **If the guarantee is extended by a promoter-which is a body corporate or an individual:** the Indian entity shall be a part of the promoter group.

**Other points for guarantees.**

- (2) **No guarantee shall be open-ended.** (i.e. it should have fixed tenure or amount, uncertainty should not be there.)
- (3) The guarantee, **to the extent of the amount invoked**, shall cease to be a part of the non-fund based commitment **but be considered as lending.** (Guarantee invoked means the party has defaulted in payment and now actual outflow will take place up to guarantee amount, hence to be taken as a debt.)
- (4) **Where a guarantee has been extended jointly and severally by two or more Indian entities, 100% of the amount of such guarantee shall be reckoned towards the individual limits of each of such Indian entities.**
- (5) In case of **performance guarantee, 50 % of the amount of guarantee** shall be reckoned towards the financial commitment limit.
- (6) **Roll-over of guarantee** shall not be treated as fresh financial commitment where the amount on account of such **roll-over does not exceed the amount of original guarantee.**

**Regulation 6- Financial commitment by way of pledge or charge**

**An Indian entity, which has made ODI by way of investment in equity capital in a foreign entity, may-**

- (a) **pledge the equity capital of the foreign entity** in which it has made ODI or of its step-down subsidiary outside India, held directly by the Indian entity in a foreign entity and indirectly in step down subsidiary, **in favour of an AD bank or a public financial institution in India or an overseas lender,** for availing fund based or non-fund based facilities
- for itself or
  - for any foreign entity in which it has made ODI or
  - its step-down subsidiaries outside India or

- in favour of a debenture trustee registered with SEBI for availing fund based facilities for itself;

**(b) create charge by way of mortgage, pledge, hypothecation or any other identical mode on–**

(i) **its assets in India**, including the **assets of its group company or associate company, promoter or director**, in favour of an AD bank or a public financial institution in India or an overseas lender

**purpose of charge**: as security for availing of the fund based or non-fund based facility or both, availing facility for any foreign entity in which it has made ODI or for its step-down subsidiary outside India; or

(ii) **the assets outside India** of the foreign entity in which it has made ODI or of its step-down subsidiary outside India **creating** charge in favour of an AD bank in India or a public financial institution in India

**purpose of charge**: as security for availing of the fund based or non-fund based facility or both, availing facility for:

- itself or
- any foreign entity in which it has made ODI or
- for its step-down subsidiary outside India or
- in favour of a debenture trustee registered with SEBI in India for availing fund based
- facilities for itself:

**Other important points:**

**1. Amount shall be taken for checking FC limits**

- the value of the pledge or charge or
- the amount of the facility,  
**whichever is less,**

shall be reckoned towards the financial commitment limit in force at the time of such pledge or charge provided such facility has not already been reckoned towards such limit; and **excluding cases where the facility has been availed by the Indian entity for itself;**

2. **Prohibition**: overseas lender in whose favour there is such a pledge or charge shall not be from any country or jurisdiction in which financial commitment is not permissible under the FEM (Overseas Investment) Rules, 2022;
3. **Compliance of FEMA**: the creation or enforcement of such pledge or charge shall be in accordance with the provisions of the Act (FEMA) or rules or regulations made or directions issued thereunder.

**Note: The “negative pledge” or “negative charge”** created by an Indian entity or a bid bond guarantee obtained in accordance with these regulations for participation in a bidding or tender

procedure for the acquisition of a foreign entity **shall not be reckoned towards the financial commitment limit.**

#### Regulation 7- Acquisition or transfer by way of deferred payment

Such deferred payment allowed in case-

- ❖ Where a PRII acquires equity capital by way of subscription to an issue or by way of purchase from a PROI or
- ❖ where a PROI acquires equity capital by way of purchase from a PRII, and

note:- **nature of such equity capital: where such equity capital is reckoned as ODI,**

**The payment of amount of consideration for the equity capital acquired may be deferred** for such definite period from the date of the agreement as provided in such agreement subject to the following terms and conditions, namely:-

- i. **the foreign securities** equivalent to the amount of total consideration shall be transferred or issued, as the case may be, upfront by the seller to the buyer;
- ii. the full consideration finally paid shall be compliant with **the applicable pricing guidelines:**

**Provided that the deferred part of the consideration in case of acquisition of equity capital of a foreign entity by a person resident in India shall be treated as non-fund based commitment.**

**Indemnification:** The buyer may be indemnified by the seller up to such amount and be subject to such terms and conditions as may be mutually agreed upon and laid down in the agreement:

#### Regulation 8- Mode of Payment by PRII while making OI

- (i) by remittance made through **banking channels;**
- (ii) from **funds held in an account** maintained in accordance with the provisions of the Act;
- (iii) by **swap of securities;**
- (iv) by using the proceeds of **ADR or GDR or stock-swap of such receipts or ECB** raised in accordance with the provisions of the Act and the rules and regulations made thereunder for making ODI or financial commitment by way of debt by an Indian entity.

#### Regulation 9- Obligations of person resident in India

1) **Important submissions:** PRII shall submit to the AD bank **share certificates** or any other relevant documents as per the applicable laws of the host country or the host jurisdiction, as the case may be, as evidence of such investment in the foreign entity **within 6 months from**

- ❖ the date of effecting remittance or
- ❖ the date on which the dues to such person are capitalised or
- ❖ the date on which the amount due was allowed to be capitalised,

as the case may be.

2) **UIN:** A PRII, through its designated AD bank, shall obtain a **Unique Identification Number** or “UIN” from the Reserve Bank **for the foreign entity in which the ODI is intended to be made before**

- ❖ sending outward remittance or
- ❖ acquisition of equity capital in a foreign entity,

**whichever is earlier.**

3) **Designated AD Bank:** A person resident in India making ODI shall designate an AD bank and route all transactions relating to a particular UIN through such AD.

**If more than one PRII makes financial commitment in the same foreign entity:** all such persons shall route all transactions relating to that UIN through the AD bank designated for that UIN.

4) **Duties of PRII w.r.t Realisation & Repatriation of Certain Amounts:** A PRII having ODI in a foreign entity, wherever applicable, shall realise and repatriate to India-

- all **dues receivable** from the foreign entity with respect to investment in such foreign entity,
- the amount of consideration received on account of **transfer or disinvestment of such ODI** and
- the **net realisable value of the assets on account of the liquidation of the foreign entity** as per the laws of the host country or the host jurisdiction, as the case may be,

**Time limit to realise and repatriate-** **within 90 days** from the date when such receivables fall due or the date of such transfer or disinvestment or the date of the actual distribution of assets made by the official liquidator.

5) **EMD/Bidding/Tender:** A person resident in India **who is eligible to make ODI**

- may make remittance towards **earnest money deposit** or
- obtain a **bid bond guarantee** from an AD bank for participation in bidding or tender procedure for the acquisition of a foreign entity:

**In case of an open-ended bid bond guarantee: it shall be converted into a close-ended guarantee not later than 3 months from the date of award of the contract.**

### Regulation 10- Reporting requirements for Overseas Investment

1. **Reporting through AD Bank** -All reporting by a PRII, as specified, **shall be made through the designated AD bank** in the manner provided in this regulation and in the format provided by the Reserve Bank.
2. **Time of reporting-** A person resident in India who has made ODI or making financial commitment or undertaking disinvestment in a foreign entity shall report the following, namely financial commitment, whether it is reckoned towards the financial commitment

limit or not, at the time of sending outward remittance or making a financial commitment, whichever is earlier;

**In case of disinvestment within 30 days** of receipt of disinvestment proceeds;

**In case of restructuring within 30 days** from the date of such restructuring.

3. **Reporting w.r.t OPI:** A PRII - other than a resident individual: **making any Overseas Portfolio Investment (OPI) or transferring such OPI by way of sale** shall report such investment or transfer of investment **within 60 days from the end of the half-year in which such investment or transfer is made as of September or March-end:**

If the OPI is by way of acquisition of shares or interest under Employee Stock Ownership Plan or Employee Benefits Scheme the reporting shall be done by

- ❖ the office in India or
- ❖ branch of an overseas entity or
- ❖ a subsidiary in India of an overseas entity or
- ❖ the Indian entity in which the overseas entity has direct or indirect equity holding

**where the resident individual is an employee or director.**

4. **APR of Foreign Entity:** **A PRII** acquiring equity capital in a foreign entity which is reckoned as ODI, shall submit an **Annual Performance Report (APR)** with respect to each foreign entity **every year by 31st December** and where the accounting year of such foreign entity ends on 31st December, submit by 31st December of the next year:

**Exemption from APR Reporting:** No such reporting shall be required where—

- (i) a PRII is holding **< 10 % of the equity capital without control** in the foreign entity and there is no other financial commitment other than by way of equity capital; or
- (ii) a **foreign entity is under liquidation.**

### 5. Important Explanations:

- ❖ **Source of APR:** the APR shall be based on the **audited financial statements of the foreign entity:**

Provided that where the person resident in India **does not have control in the foreign entity** and the laws of the host country do not provide for mandatory auditing of the books of accounts,

- ❖ the APR may be submitted based on **unaudited financial statements**
- ❖ certified as such by the **statutory auditor of the Indian entity or**
- ❖

by a chartered accountant where the statutory audit is not applicable;

- ❖ **in case more than one person resident in India have made ODI in the same foreign entity**, the person holding the **highest stake** in the foreign entity shall be required to submit APR and in case of **holdings being equal, APR may be filed jointly by such persons**;
  - ❖ the person resident in India shall report the details regarding acquisition or setting up or winding up or transfer of a step-down subsidiary or alteration in the shareholding pattern in the foreign entity during the reporting year in the APR.
6. **Annual Return** - An Indian entity which has made ODI shall submit an Annual Return on Foreign Liabilities and Assets within such time as may be decided by the Reserve Bank from time to time, **to the Department of Statistics and Information Management, Reserve Bank of India.**

#### Regulation 11- Delay in reporting.

**Delay w.r.t evidence of investment filing or above stated reporting:** he may make such submission or filing, as the case may be, along with **Late Submission Fee [LSF]** within such period as may be advised, and at the rates and in the manner as may be directed by the Reserve Bank, from time to time:

**Maximum time limit even with LSF:** Such facility can be availed **within a maximum period of 3 years from the due date.**

**Transitional Provisions:** may be directed by the Reserve Bank, from time to time. Provided that such facility can be availed within a maximum period of 3 years from the date of publication [22/8/22] of these regulations in the Official Gazette.

#### Regulation 12- Restriction on further financial commitment or transfer

If there is any delay in reporting, the delay should be regularised to make any further FC or transfer such investment.

## 2. FCRA

1. **Rule 6-intimation to CG in case of FC from relative** in excess of Rs. 1,00,00 or equivalent in a FY, within 30 days

**Amendment:** Rs. 1,00,000 revised to **Rs. 10,00,000; and** time limit revised from **30 days to 3 months**

2. **Submission of Applications for Revision of Orders under Section 32 of the Foreign Contribution (Regulation) Act, 2010, Read with Rule 20 of the Foreign Contribution (Regulation) Rules, 2011**

Instead of application on a plain paper, it shall be in "**in such form and manner, including in electronic form** as may be specified by the CG".

It is hereby ordered that w.e.f. 1st September 2022 an application under section 32 of the Act for revision of an order passed by the competent authority shall be made in electronic form only through the website <https://fcraonline.nic.in>

### **3. FAQs regarding online submission of application for revision of an order passed by the competent authority under section 32 of the FCRA, 2010.**

#### **Q.1 Who is eligible to submit revision application?**

Ans. Any person who is **registered under the FCRA, 2010** and rules made thereunder and is aggrieved of an order of the Central Government may prefer revision application in terms of section 32 of the FCRA 2010 and rule 20 of the Foreign Contribution (Regulation) Rules, 2011 (FCRR 2011).

#### **Q.2 Can revision application be sent through physical mode (on paper mode)?**

Ans. **No.** With effect from 15 August 2022, applications are acceptable only in electronic mode.

#### **Q.3 What is the procedure for an association to file an application for revision of an order passed by the competent authority under FCRA, 2010?**

Ans. Any organization who wants to file an application for revision of an order passed by the competent authority may upload a **scanned copy of its application on the FCRA web portal** (<https://fcraonline.nic.in/>). Under main heading "**Services under FCRA**", Sub heading "Revision Application against Section 32, FCRA 2010".

#### **Q.4 Is it required to send physical copy of electronically filed revision application to Ministry of Home Affairs (MHA)?**

Ans. There is **no need to send physical copy** of revision application or any related document to MHA.

#### **Q.5 Is there any format of revision application?**

Ans. No. Scanned copy of duly signed application in plain paper is acceptable.

#### **Q.6 Is applicant required to submit justification for revision of Order?**

Ans. Yes. Justification for revision of Order must be submitted online along with the supporting documents, if any.

#### **Q.7 What is the fee for making an application for revision of an order passed by the competent authority under FCRA, 2010?**

Ans. **A fee of Rs.3000/-** (Three Thousand only) must be paid through the payment gateway specified by the Central Government.

#### **Q.8 What is the time limit for making an application for revision of an order passed by the competent authority under FCRA, 2010?**

Ans. The application must be made **within 1 year** from the date on which the order in question was communicated or the date on which it otherwise came to know of it, whichever is earlier. [Sec. 32(3)]



### 3. IBC

#### 1. Regulation 18 (Meetings of Committee) of the of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

(1) A resolution professional may convene a meeting of the committee as and when he considers necessary.

(2) A resolution professional may convene a meeting, if he considers it necessary, on a request received from members of the committee and shall convene a meeting if the same is made by members of the committee representing **at least 33% of the voting rights**.

**Explanation:** For the purposes of sub- regulation (2) it is clarified that meeting (s) may be convened under this sub-regulation **till the resolution plan is approved** under sub-section (1) of section 31 or **order for liquidation is passed** under section 33 and decide on matters which **do not affect the resolution plan submitted before the Adjudicating Authority**.

(3) A resolution professional may place a proposal received from members of the committee in a meeting, if he considers it necessary and shall place the proposal if the same is made by members of the committee representing **at least 33% of the voting rights**.

#### 2. Regulation 5 (Appointment of Liquidator: Replacement of Liquidator under Voluntary Liquidation)

The insolvency professional shall, **within 7 days** (earlier 3 days) of his appointment as liquidator, intimate the Board about such appointment.

#### 3. Rule 4- under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

The applicant shall serve a copy of the application to the registered office of the corporate debtor and to the Board, **by registered post or speed post or by hand or by electronic means**, before filing with the Adjudicating Authority.

#### 4. Regulation 30- the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (proviso inserted)

Provided that the liquidator shall also verify the claims collated during the CIRP but not submitted during the liquidation process, **within 30 days from the last date for receipt of claims** during liquidation process and may either admit or reject the claim, in whole or in part.

### 4. Directors

#### 1. Rule 8 Companies (Appointment and Qualification of Directors) Rules, 2014

In rule 8, after the proviso, the following proviso shall be inserted, namely:-

“Provided further that in case the person seeking appointment is a national of a country which shares land border with India, **necessary security clearance from the Ministry of Home Affairs, Government of India shall also be attached along with the consent.**”;

## 2. Rule 10 Companies (Appointment and Qualification of Directors) Rules, 2014

In rule 10, in sub-rule (1), the following proviso shall be inserted, namely: -

“Provided that no application number shall be generated in case of the person applying for Director Identification Number is a national of a country which shares land border with India (Pakistan, Afghanistan, China, Nepal, Bhutan, Myanmar and Bangladesh) , unless **necessary security clearance from the Ministry of Home Affairs**, Government of India has been attached along with application for Director Identification Number.”

## 3. The Companies (Appointment and Qualification of Directors) Second Amendment, Rules, 2022 Rule 6 sub rule 5

In the Companies (Appointment and Qualification of Directors) Rules, 2014, in rule 6 (Independent Director Data bank), after sub-rule (4), **the following sub-rule shall be inserted, namely: -**

Any individual whose name has been **removed** from the databank under sub-rule (4) {non-passing of Test}, **may apply for restoration of his name on payment of fees of Rs. 1,000** and the institute shall allow such restoration subject to the following conditions, namely :-

(i) his name shall be shown in a **separate restored category for a period of 1 year from the date of restoration within which**,

- he shall be required to **pass the online proficiency self-assessment test** and
- thereafter his name shall be included in the databank, only, if he passes the said online proficiency self-assessment test and, in such case, the fees paid by him at the time of initial registration shall continue to be valid for the period for which the same was initially paid; and

(ii) in case he fails to pass the online proficiency self-assessment test **within 1 year from the date of restoration**,

- his name shall be removed from the data bank and
- he shall be required to apply afresh under sub-rule (1) for inclusion of his name in the databank

**\*\*Space for Notes\***