

Recent Important Developments in FEMA - Capital & Current Account Transactions

**One-day Conference on Practical Issues under FEMA
organized jointly by BCAS & CTC**

**IMC, Mumbai
22nd February 2025**

CA Rutvik Sanghvi

Recent Developments in FEMA – Contents

(Covering developments from April 2024 to February 2025) Contd....

Sr. No.	Particulars
1	Introduction
2	Indirect Foreign Investment clarity
3	Cross-border Swaps
4	Overseas Portfolio Investment
5	Non-repatriable investments excluded from IFI calculation
6	LRS in IFSC

Recent Developments in FEMA – Contents

(Covering developments from April 2024 to February 2025)... Contd.

Sr. No.	Particulars
7	Reclassification of FPI to FDI
8	Other Changes in Master Direction on Foreign Investment in India
9	Changes in Compounding Rules
10	Introduction of PRAVAAH Portal
11	Other FEMA Updates including Legal changes and Developments in FIRMS Portal

Introduction

FEMA – What it really is!

- ▶ Government “Policy” drafted in a legal language
 - ▶ Written in non-legal language
 - ▶ Compounded by change in position later in time
 - ▶ Not the best drafting
 - ▶ Precis writing gone bad
 - ▶ Aggravated when ‘interpreted’
 - ▶ Technical interpretation will not work
 - ▶ Absence does not mean that it is permitted, rather the reverse
 - ▶ Multiple notifications and rules can apply to a particular transaction
 - ▶ Inconsistencies between RBI and other regulators
- ▶ Intent matters over and above everything else
 - ▶ Some views have been changed - with retrospective effect!
 - ▶ Views change as you move down the corridor!
 - ▶ Lack of institutional memory

Principles

- ▶ Regulation is based on:
 - ▶ **Person:**
 - ▶ Whether the person is a Resident In India (PRII) or Resident Outside India (PROI)
 - ▶ **Transaction:**
 - ▶ Whether it is a Current or Capital Account transaction
- ▶ FEMA does not apply:
 - ▶ Between 2 Residents – unless it's an overseas transaction
 - ▶ Between 2 non-residents – unless its for an Indian transaction
- ▶ But every rule has exceptions:
 - ▶ Foreign branches and overseas JV/WOS are still under FEMA net
 - ▶ Residents outside India – FEMA still applies
 - ▶ Citizens of certain countries – FEMA still applies even if they are Resident for immovable property

Spirit of FEMA

- ▶ FEMA is based on substance and does not require provisions to mandate that transactions must be done in spirit and fairness
- ▶ Even if there are no anti-abuse provisions, being a policy-driven law, abuse of provisions would lead to penal issues
- ▶ This logic is put forward in following manner:

What cannot be done directly,
cannot be done indirectly

- ▶ Finds explicit mention in the FEMA provisions for IFI Rules

Indirect Foreign Investment clarity

Amendment in Master Direction on Foreign Investment in India on 20th January 2025

▶ 9. Downstream Investment

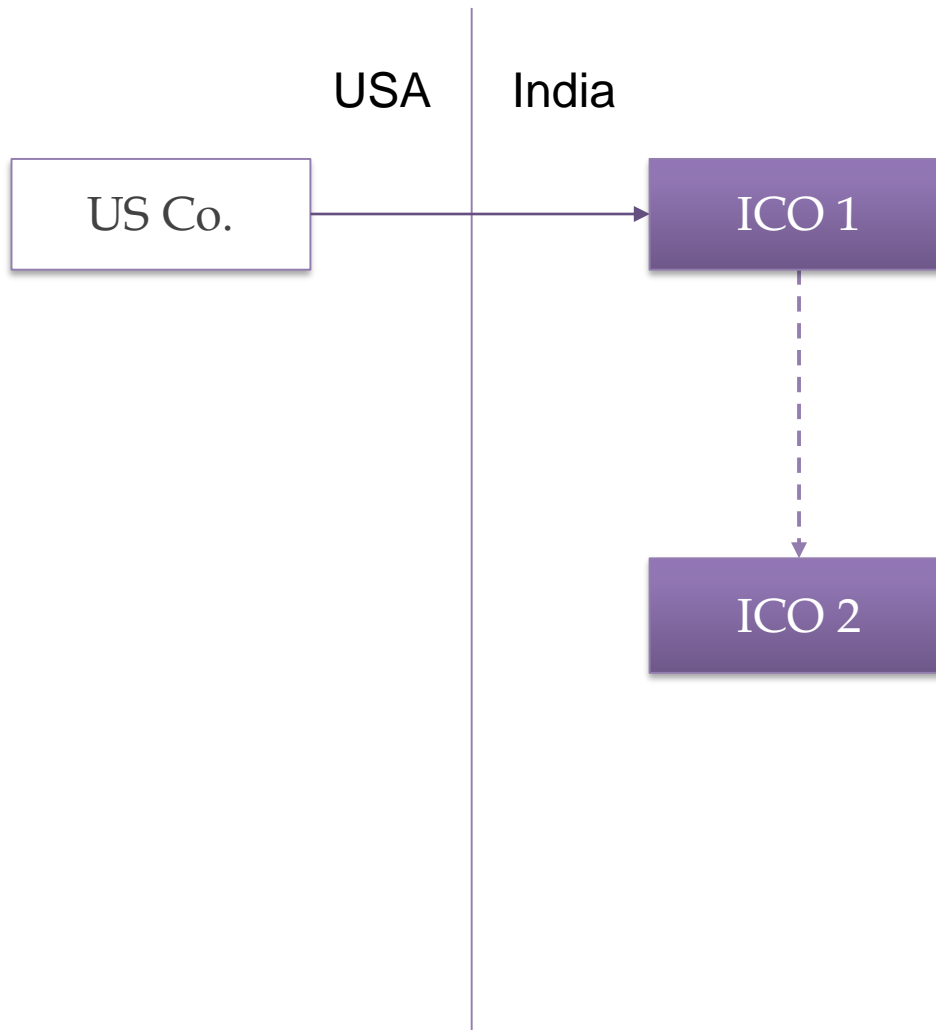
- ▶ The **guiding principle of the downstream investment guidelines is that “what cannot be done directly, shall not be done indirectly”**. Accordingly, downstream investments which are treated as indirect foreign investment are subject to the entry routes, sectoral caps or the investment limits, as the case may be, pricing guidelines, and the attendant conditionalities for such investment as laid down in the NDI Rules.
- ▶ **Note: Based on the guiding principle of the downstream investment, the arrangements which are available for direct investment under the Rules such as investment by way of swap of equity instrument / equity capital, payment arrangements / mechanism as per Rule 9(6) of the Rules etc., shall also be available for the purpose of downstream investment provided that the transaction does not circumvent the provisions contained in Rule 23 of the Rules, including the restrictions on use of borrowed funds for downstream investment.**

Under IFI Rules - What can be done directly,
can be done indirectly!

Reliefs extended to FOCCs vide clarification dated 20th January 2025

- ▶ FOCCs are to be considered as NRs for all practical purposes
- ▶ Swap (covered in detail later)
- ▶ Deferred consideration
- ▶ Escrow arrangement
- ▶ Indemnification
- ▶ Pledge arrangements permitted to NRs
- ▶ FDI-related provisions including pricing guidelines would also not apply to transactions between:
 - ▶ One FOCC and another FOCC
 - ▶ One FOCC and another NR
 - ▶ Para 9.6.1 of Master Direction on Foreign Investment in India

Investment by FOCC on deferred basis



- ▶ US Co. holds shares of ICO 1, which is an FOCC.
- ▶ ICO 1 wants to purchase the shares of ICO 2.
- ▶ However, it wants to pay part of the consideration on a deferred basis.
- ▶ This has now been clarified to be permitted.

Investment by FOCC on deferred basis

- ▶ **23. Downstream investment** - (1) Indian entity which has received indirect foreign investment shall comply with the entry route, sectoral caps, pricing guidelines and other attendant conditions as applicable for foreign investment.
- ▶ Rule 9(6) of NDI Rules:
- ▶ (6) In case of transfer of equity instruments **between a person resident in India and a person resident outside India**, an amount not exceeding twenty five percent of the total consideration,-
 - ▶ (i) may be paid by the buyer on a deferred basis within a period not exceeding eighteen months from the date of the transfer agreement; or
 - ▶ (ii) may be settled through an escrow arrangement between the buyer and the seller for a period not exceeding eighteen months from the date of the transfer agreement; or
 - ▶ (iii) may be indemnified by the seller for a period not exceeding eighteen months from the date of the payment of the full consideration, if the total consideration has been paid by the buyer to the seller
- ▶ Provided that the total consideration finally paid for the shares shall be compliant with the applicable pricing guidelines.

Cross-Border Swaps

Swap of shares under FEMA – a timeline

From	Document	Swap permitted	Remarks
19 th November 2004	FEMA 120 Continued in OI Rules – Aug 2022	ODI-ODI	Indian entities permitted to acquire shares of foreign company through swap of shares.
15 th February 2016	FEMA 20	FDI-FDI (Primary swap)	Indian entities permitted to “issue” shares to non-residents against <u>swap of shares of Indian company.</u>
16th August 2024	Amendment in NDI Rules	FDI-FDI (Secondary swap) & ODI-FDI	NRs permitted to acquire shares of Indian company by way of <u>swap of shares of foreign company.</u>
20th January 2025	Master Direction on Foreign Investment in India	Above swaps permitted to FOCCs	Clarification provided that the arrangements allowed to NRs are also permitted to FOCCs.

Swap of shares – Introduction

- ▶ Swap of shares has become one of the popular manners for corporate restructuring, especially for startups
- ▶ A company wanting to buy shares of another company offers consideration in kind instead of in cash – through transfer of its own shares or of a third company held by it.
- ▶ The seller/ issuer is willing to acquire the shares of the third company in consideration instead of cash
- ▶ Huge benefit from cash flow perspective
- ▶ Common and helpful in corporate restructuring

Swap of shares – General points

- ▶ Cross-border angle leads to applicability of FEMA
- ▶ Several permutations possible

- ▶ Pricing guidelines to be adhered to
- ▶ Valuation to be done
- ▶ Difference to be paid

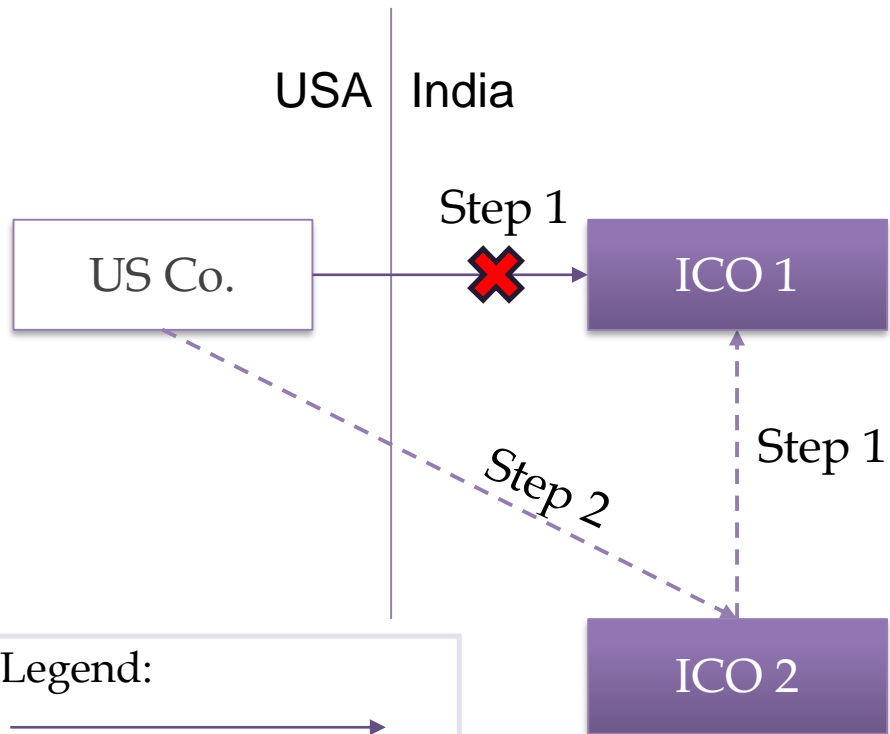
- ▶ Reporting requirements to be met

- ▶ Income-tax issues also to be kept in mind
 - ▶ Transfer Pricing, valuation norms
- ▶ Swap may not be preferred due to tax considerations
- ▶ But preferable where cash flow considerations are paramount

Swap of shares under NDI Rules – How it operates

- ▶ **Rule 6** - A person resident outside India may make investment as under -
 - ▶ (a) may **subscribe, purchase or sell** equity instruments of an Indian company in the manner and subject to the terms and conditions specified in Schedule I;...
 - ▶ **Schedule I**
 - ▶ (1) **Purchase or sale** of equity instruments of an Indian company by a person resident outside India
 - ▶ ...
 - ▶ (d) An Indian company **may issue**... equity instruments to a person resident outside India.... against -
 - ▶ (i) **swap of equity instruments**; or...
- ▶ **Rule 2(k):**
 - ▶ (k) “equity instruments” means equity shares, convertible debentures, preference shares and share warrants issued **by an Indian company**.

Swap 1: ICO issuing shares to US Co for another ICO's shares



Legend:

→ Existing investment

- - - Proposed investment

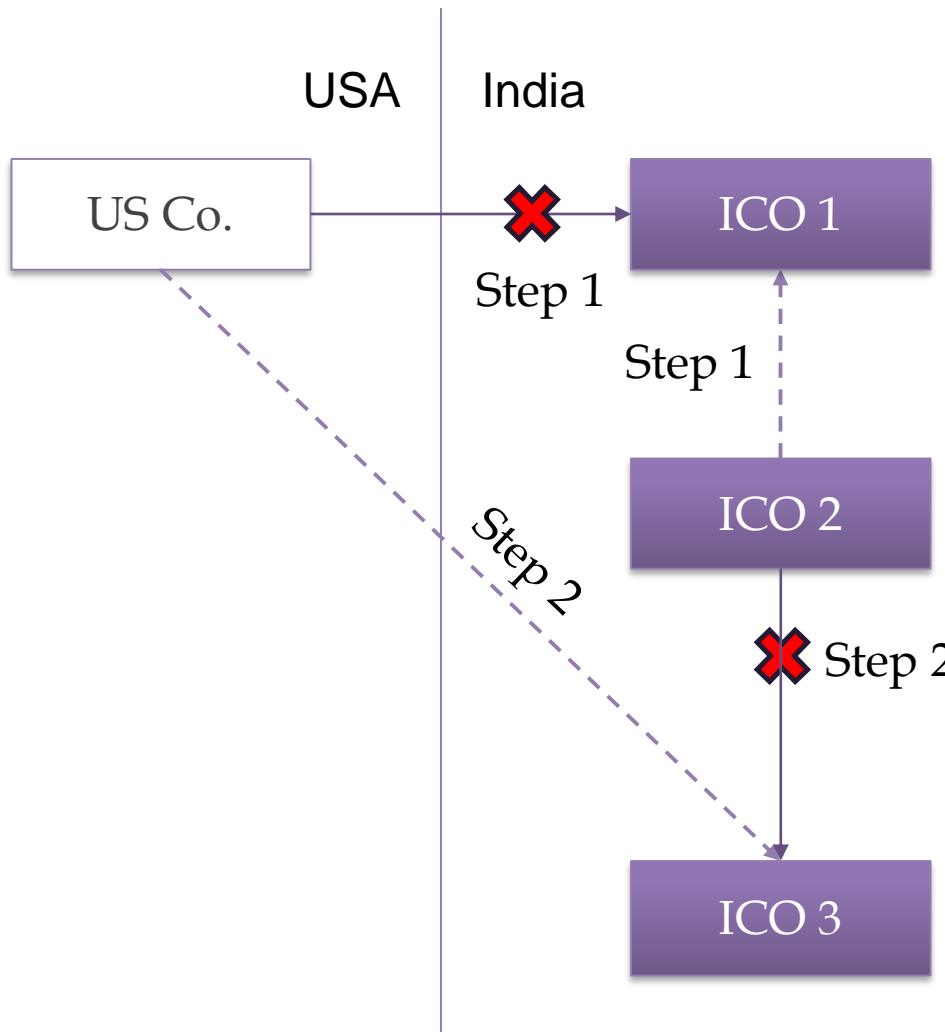
✘ Transfer

- ▶ US Co. held shares of ICO 1
- ▶ **Transaction:** US Co. sold shares of ICO 1 to ICO 2 and subscribed to shares of ICO 2 in consideration.
- ▶ **Step 1:** US Co. sold the shares of ICO 1 to ICO 2
- ▶ **Step 2:** In consideration, ICO 2 issued its own shares to US Co.

Analysis of Swap 1: ICO issuing shares to US Co for another ICO's shares

- ▶ Indian Company (ICO 2) is issuing shares to Foreign Company (F CO).
- ▶ Foreign company (F CO) in consideration is swapping shares held by it in an Indian company (I CO 1).
- ▶ ICO is issuing equity instruments to FCO in swap of equity instruments.
- ▶ Permitted as per NDI Rules.

Swap 2: ICO transferring shares of another ICO to US Co. in swap of shares of third ICO



- ▶ US Co. held shares of ICO 1.
- ▶ ICO 2 held shares of ICO 3.
- ▶ **Transaction:** US Co. sold shares of ICO 1 to ICO 2 and in consideration acquired shares of ICO 3.
- ▶ **Step 1:** US Co. sold shares of ICO 1 to ICO 2.
- ▶ **Step 2:** In consideration, ICO 2 transferred the shares of ICO 3 to US Co.

Analysis of Swap 2: ICO transferring shares of another ICO to US Co. in swap of shares of third ICO

- ▶ Foreign company is transferring its shares of an Indian company to acquire shares of another Indian Company
- ▶ FCO is transferring equity instruments in swap of other equity instruments.
- ▶ R. 6 r.w. Sch. I (1) (d) - *An Indian company may issue... equity instruments to a person resident outside India.... against...*
- ▶ Only 'issue' was covered and not transfer
- ▶ Therefore, all swaps for transfer were under permission route

Rule 9A inserted in NDI Rules on 16th August 2024

- ▶ **“9A. Swap of equity instruments and equity capital. —** The **transfer** of equity instruments of an Indian company between a person resident in India and a person resident outside India may be by way of—
 - ▶ (i) swap of equity instruments, in compliance with the rules prescribed by the Central Government and the regulations specified by the Reserve Bank from time to time;
 - ▶ ...
- ▶ Now Permitted under NDI Rules as per Rule 9A
 - ▶ Or was it permitted all along?

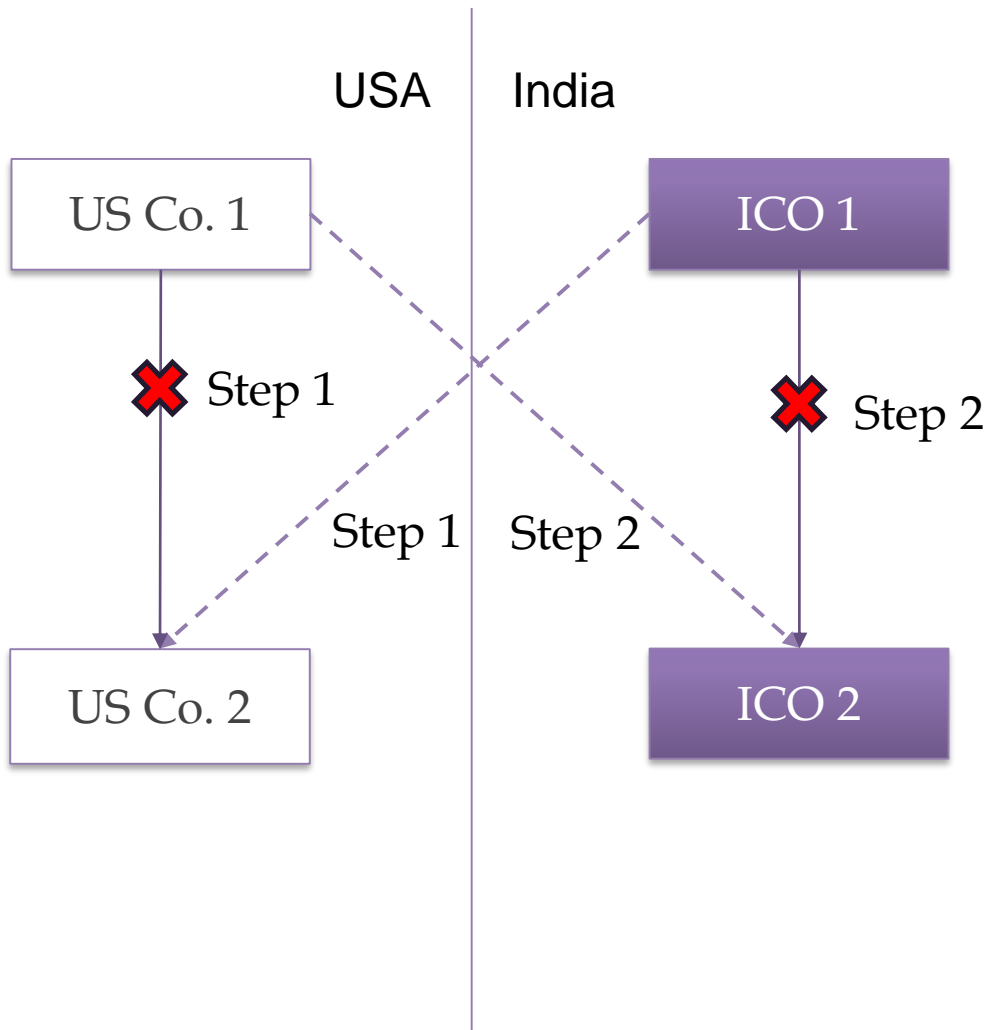
Issue vs. Transfer - Was this amendment required?

- ▶ For the purpose of NDI Rules, should “Transfer” get covered under “issuance”?
- ▶ Under FEMA, both terms “purchase” and “subscription” of shares may be considered equivalent as can be noticed in:
- ▶ Rule 6 of NDI rules provides as under: *“Investments by person resident outside India: - A person resident outside India may make investment as under:-(a) may subscribe, **purchase** or sell equity instruments of an Indian company in the manner and subject to the terms and conditions specified in Schedule I:”*
- ▶ Para 2.12 of the Master Direction defines ‘Investment’ to mean *“**subscribe, acquire, hold or transfer any security or unit issued by a person resident in India.**”*
- ▶ Schedule I of NDI Rules and Annex 1 of Master Direction covers various modes for *“**Purchase or Sale of equity instruments of an Indian company by a person resident outside India**”*.
- ▶ Sub-clause (iv) of Rule 21(2)(c) dealing with valuation of swaps in the context of equity instruments **transferred** by a person resident outside India to a person resident in India.
- ▶ Similar position can be found in reporting provisions and in Master Directions

Issue vs. Transfer - Was this amendment required?

- ▶ The erstwhile Notification No. 20 on Foreign Investment permitted acquisition of shares by way of swap of shares subject to Government approval. From February 15, 2016, acquisition by way of swap of shares was permitted under automatic route as long as the investee company was under automatic route. This position has continued since then even under the revised notification no. 20(R) of 2017 on foreign investment, and also under the present NDI rules issued on 17.10.2019.
- ▶ However, there was a view that only “issue” of equity instruments was allowed and not transfer

Swap 3: ICO swapping shares of another ICO, with an FCO for another FCO's shares



- ▶ US Co. 1 held shares of US Co. 2.
- ▶ ICO 1 held shares of ICO 2.
- ▶ **Transaction:** US Co. 1 and ICO 1 swapped the shares held by them.
- ▶ **Step 1:** US Co. 1 transferred shares of US Co. 2 to ICO 1
- ▶ **Step 2:** In consideration, ICO 1 transferred shares of ICO 2 to US Co. 1.

Schedule I to OI Rules (notified in August 2022)

- ▶ **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 in the manner and subject to the limits and conditions provided in this Schedule.

- ▶ (2) The ODI may be made or held by way of,—
- ▶ (i) subscription as part of memorandum of association 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) capitalisation, within the time period, if any, specified for realisation under the Act, of any amount due towards the Indian entity from the foreign entity.....;
- ▶ **(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.

Reg. 8 of OI Regulations

- ▶ **8. Mode of payment.** – A person resident in India making Overseas Investment may make payment –
 - ▶ (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 American Depository Receipts or Global Depository Receipts or stockswap of such receipts or external commercial borrowings 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.

Analysis of Swap 3: ICO swapping shares of another ICO, with an FCO for another FCO's shares

- ▶ ICO is making ODI by way of swap of securities
- ▶ Permitted for ICO 1 under OI Rules

- ▶ FCO is acquiring shares of Indian company in swap of shares of a foreign company
- ▶ FCO is acquiring 'equity instruments' against swap of securities **which are not equity instruments**
 - ▶ As shares of US Co. 2 are not issued **by an Indian company**

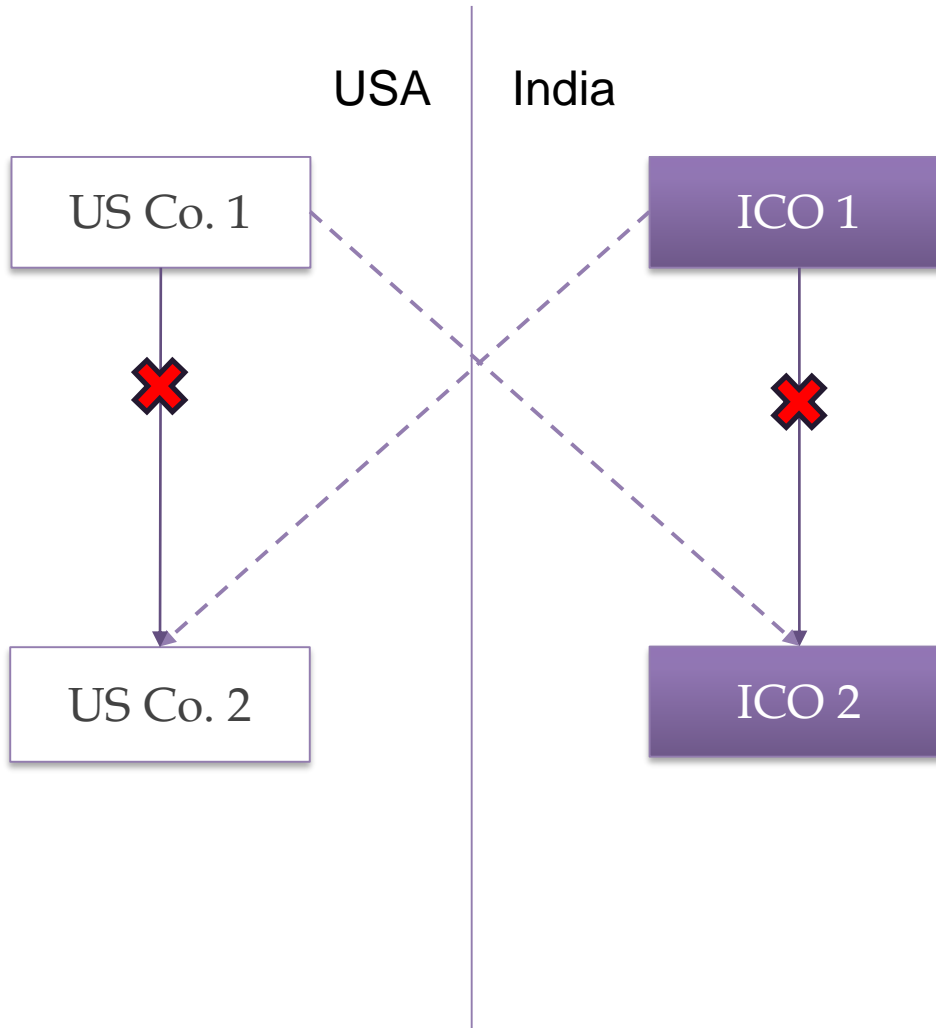
- ▶ Hence, was not a permitted manner to make FDI as per NDI Rules
- ▶ FDI leg required prior approval
- ▶ Non-starter for effective cross-border swaps
- ▶ Many startups which wanted to externalise were hit by this restriction

- ▶ **ODI-FDI swap brought under automatic route finally in August 2024**

Rule 9A inserted in NDI Rules on 16th August 2024

- ▶ **“9A. Swap of equity instruments and equity capital. —** The transfer of equity instruments of an Indian company between a person resident in India and a person resident outside India may be by way of—
- ▶ (i) swap of equity instruments, in compliance with the rules prescribed by the Central Government and the regulations specified by the Reserve Bank from time to time;
- ▶ (ii) **swap of equity capital of a foreign company** in compliance with the rules prescribed by the Central Government including the Foreign Exchange Management, (Overseas Investment) Rules, 2022, and the regulations specified by the Reserve Bank from time to time:
- ▶ Provided that prior Government approval shall be obtained for transfer in all cases wherever Government approval is applicable.
- ▶ **Explanation. –** For the purposes of this clause, the expression **“equity capital” shall have the same meaning as assigned to it in the Foreign Exchange Management, (Overseas Investment) Rules, 2022, as amended from time to time.”**.

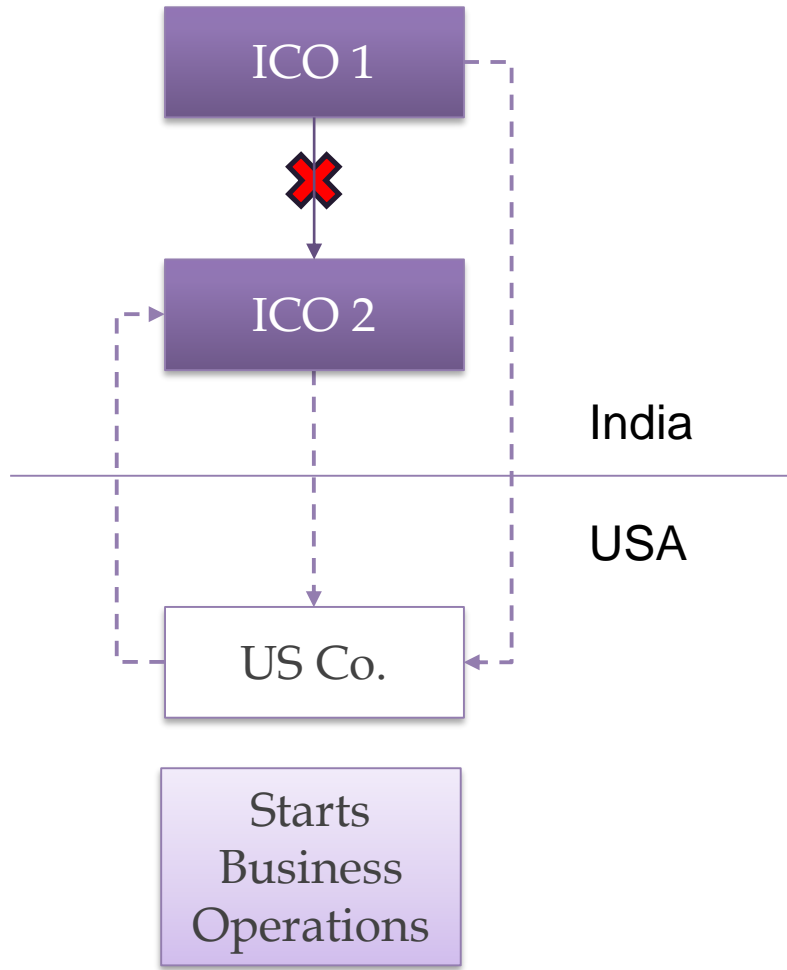
Swap 3: ICO swapping shares of another ICO, with an FCO for another FCO's shares



- ▶ Acquiring equity instruments by way of swap of “equity capital” of foreign company now permitted
- ▶ Equity capital definition in NDI Rules same as that of OI Rules
- ▶ FDI leg of ODI-FDI swap brought under automatic route
- ▶ This swap is permitted under automatic route from 16th August 2024

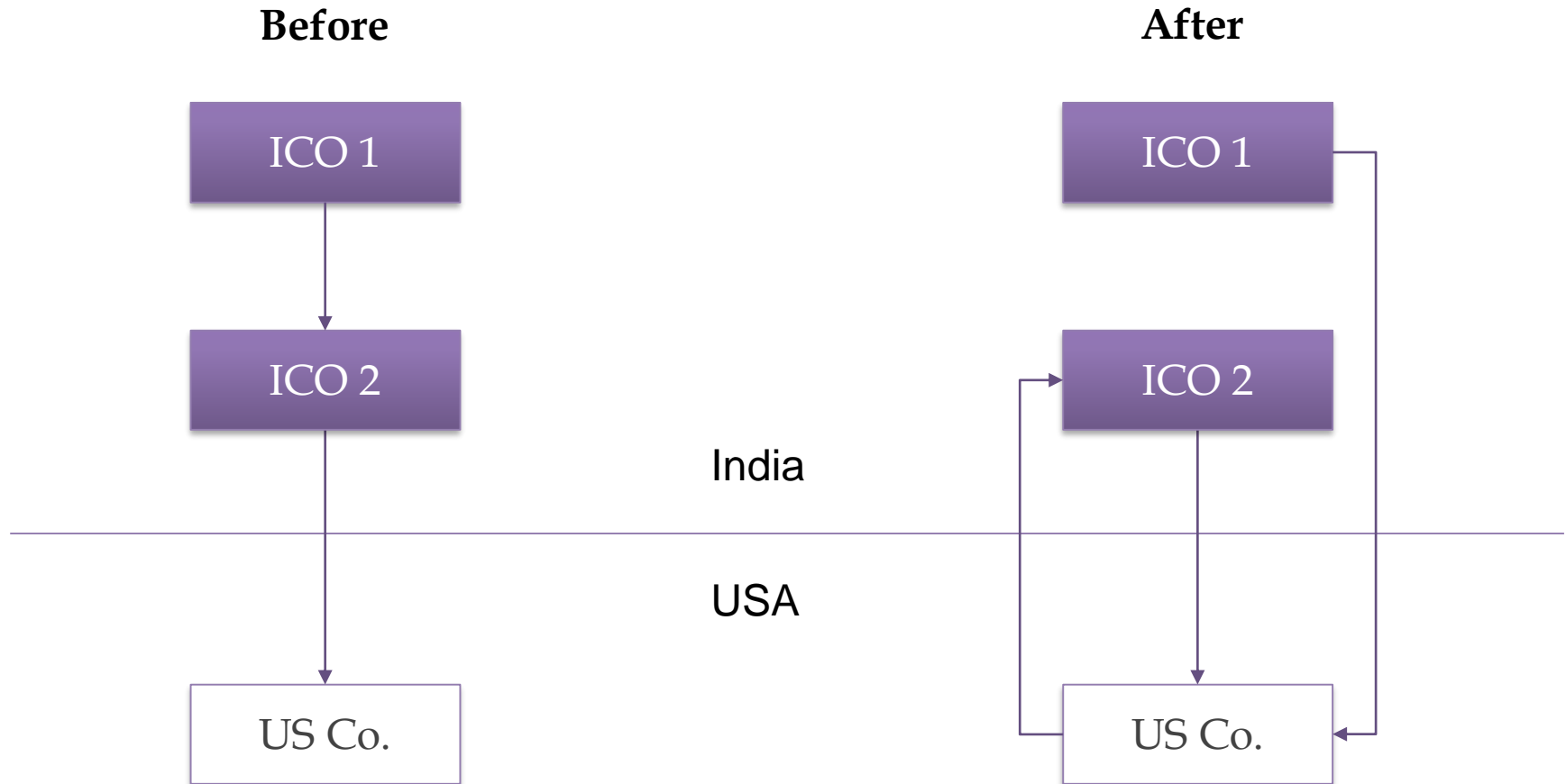
**Externalisation & Internalisation
now possible through Swap**

Swap 4: Externalisation through Swap



- ▶ ICO 1 wants to flip its holding company structure such that a US Co. is the holding Co.
- ▶ ICO 1 holds shares of ICO 2.
- ▶ ICO 2 does ODI and sets up US Co.
- ▶ US Co. starts business operations
- ▶ US Co. acquires the shares of ICO 2 (it's holding company) from ICO 1 and issues its own shares to ICO 1.

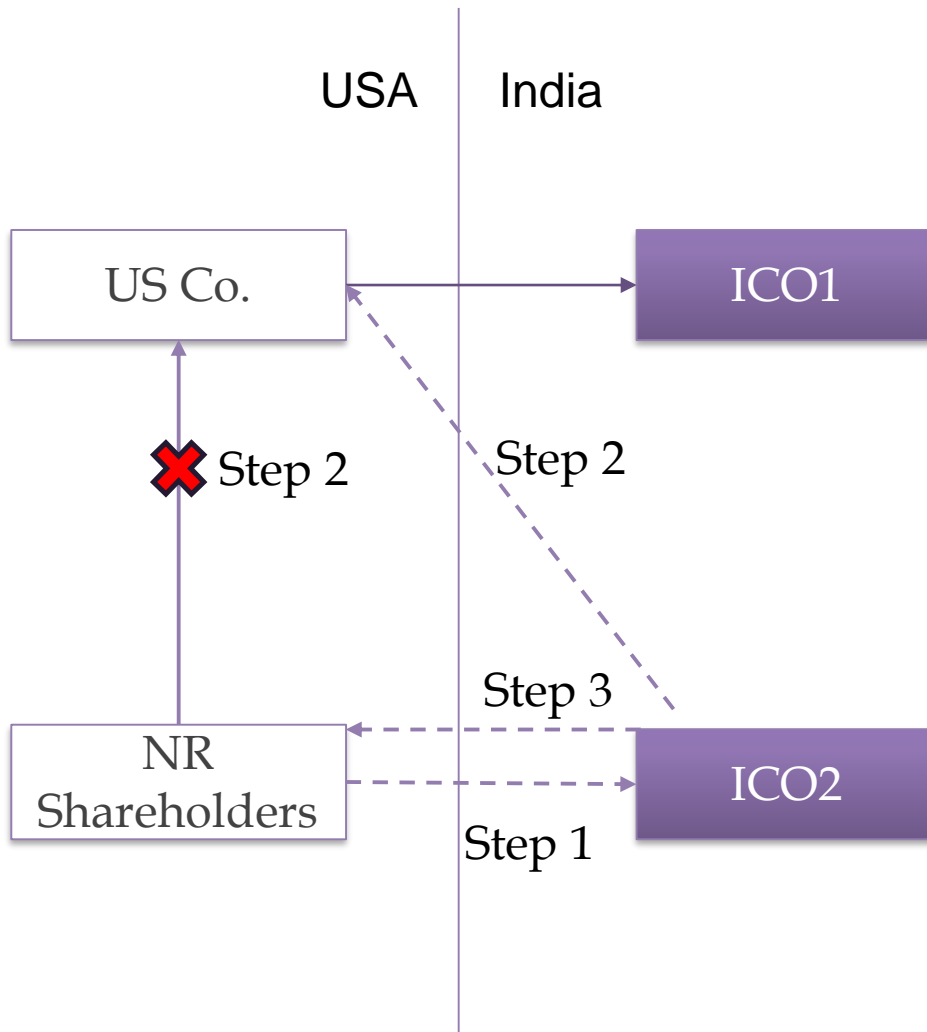
Swap 4: Externalisation through Swap



Swap 4: Analysis of Externalisation through Swap

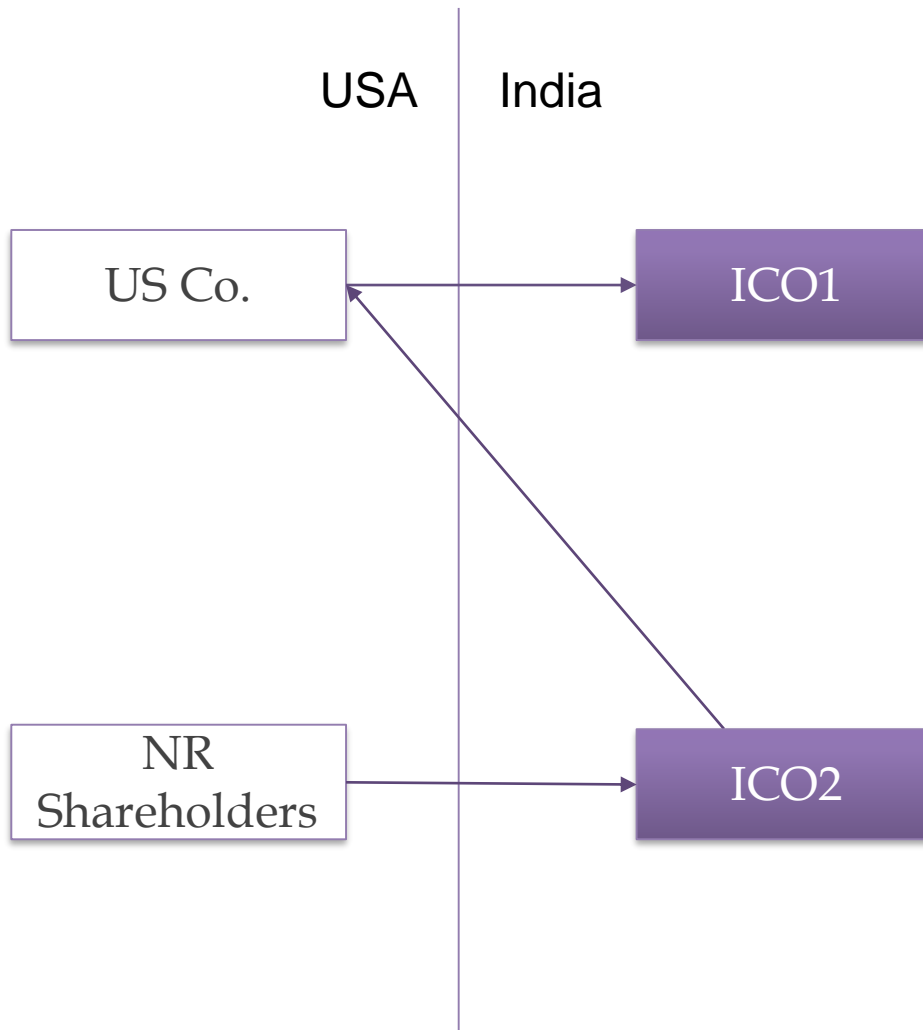
- ▶ ICO 1 making ODI by way of swap of securities is anyways permitted
- ▶ Round tripping is permitted since August 2022
 - ▶ Upto 2 layers of subsidiaries
- ▶ **US CO., an NR, acquiring equity instruments against swap of “equity capital” is now permitted from August 2024**
- ▶ Swap still a transfer – hence taxable

Swap 5: Reverse-Flipping



- ▶ US Co. holds shares of ICO1.
- ▶ **Objective:** ICO2 to become Holding company of US Co.
- ▶ **Transaction:** ICO acquires shares of US Co. and in turn transfers ICO2's shares
- ▶ **Step 1:** Shareholders set up ICO2
- ▶ **Step 2:** ICO2 acquires shares of US Co. In turn ICO2 issues its own shares to its Shareholders

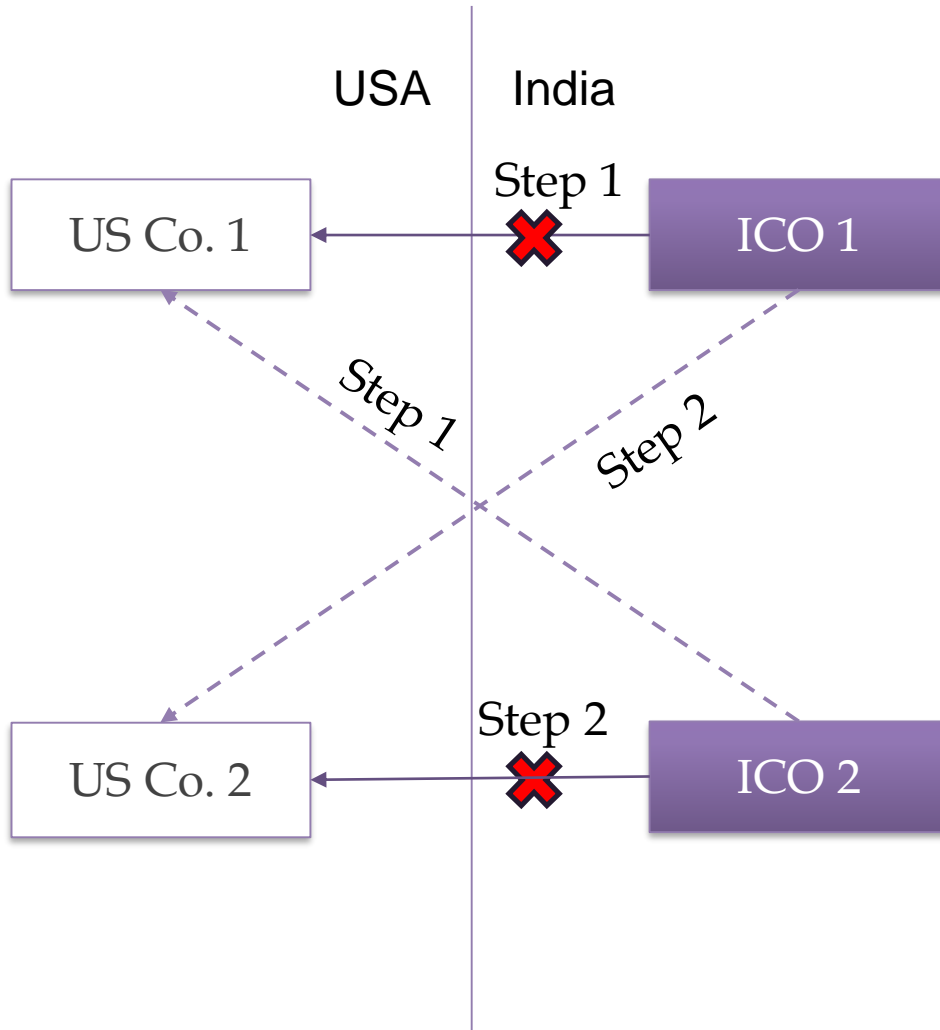
Swap 5: Reverse-Flipping



- ▶ ICO2 is acquiring shares of US Co. from shareholders of US Co. by way of swap of securities
 - ▶ Permitted under OI Rules.
- ▶ Issue of shares by ICO2 to NR Shareholders against swap of equity capital of US Co.
 - ▶ Permitted under NDI Rules w.e.f. 16th August 2024
- ▶ ICO2 holding ICO1 through US Co. – round tripped structure
 - ▶ Permitted under OI Rules

Issue of 'transfer' under OI Rules

Swap 6: ICOs swapping shares of FCOs held by them



- ▶ ICO 1 held shares of US Co. 1.
- ▶ ICO 2 held shares of US Co. 2.
- ▶ **Transaction:** ICO 1 & ICO 2 swapped the shares of US Cos. held by them.
- ▶ **Step 1:** ICO 1 sold shares of US Co. 1 to ICO 2
- ▶ **Step 2:** ICO 2 sold shares of US Co. 2 to ICO 1.

Rule 17 of OI Rules

- ▶ **17. Transfer or liquidation.**– (1) Unless otherwise provided in these rules, a person resident in India holding equity capital in accordance with these rules may transfer such investment, in compliance with the limits and subject to the conditions for such investment or disinvestment, pricing guidelines or documentation and reporting requirements, in the manner provided in these rules and the Foreign Exchange Management (Overseas Investment) Regulations, 2022.
- ▶ (2) A person resident in India may transfer equity capital **by way of sale** to a person resident in India, who is eligible to make such investment under these rules, or to a person resident outside India.
- ▶ (3) In case the transfer is on account of **merger, amalgamation or demerger or on account of buyback of foreign securities**, such transfer or liquidation in case of liquidation of the foreign entity, shall have the **approval of the competent authority** as per the applicable laws in India or the laws of the host country or host jurisdiction, as the case may be.
- ▶ **Swap of Shares is not covered in Rule 17 as manner in which F CO. shares can be transferred!!**

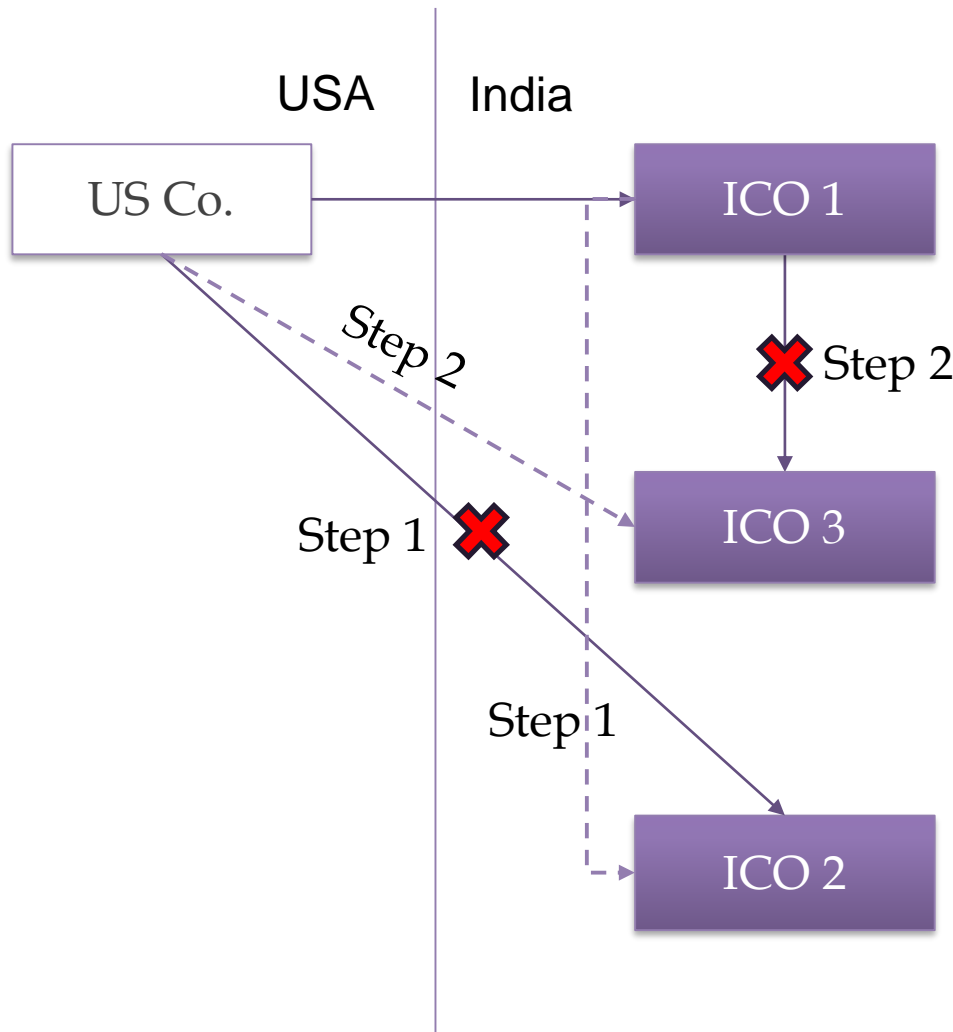
Analysis of Swap 6

- ▶ **Transaction:** ICO 1 & ICO 2 swapped the shares of US Cos. held by them.
- ▶ For both ICOs, acquisition of FCO's shares by swap is permitted under OI Rules.
- ▶ However, disinvesting from existing ODI by way of swap is not specifically permitted as per Rule 17 of OI Rules.

Is only Investment allowed by way of Swap and not Disinvestment??

Swaps by FOCCs

Swap 7: FOCC swaps shares of ICO1 to acquire ICO2



- ▶ US Co. held shares of ICO 1 and ICO 2.
- ▶ ICO 1 held shares of ICO 3.
- ▶ **Transaction:** ICO 1 sold shares of ICO 3 to US Co. and acquired shares of ICO 2 in consideration.
- ▶ **Step 1:** ICO 1 purchased the shares of ICO 2 from US Co.
- ▶ **Step 2:** In consideration, ICO 1 transferred the shares of ICO 3 to US Co.

Amendment in Master Direction on Foreign Investment in India on 20th January 2025

▶ 9. Downstream Investment

- ▶ The **guiding principle of the downstream investment guidelines is that “what cannot be done directly, shall not be done indirectly”**. Accordingly, downstream investments which are treated as indirect foreign investment are subject to the entry routes, sectoral caps or the investment limits, as the case may be, pricing guidelines, and the attendant conditionalities for such investment as laid down in the NDI Rules.
- ▶ **Note: Based on the guiding principle of the downstream investment, the arrangements which are available for direct investment under the Rules such as investment by way of swap of equity instrument / equity capital, payment arrangements / mechanism as per Rule 9(6) of the Rules etc., shall also be available for the purpose of downstream investment provided that the transaction does not circumvent the provisions contained in Rule 23 of the Rules, including the restrictions on use of borrowed funds for downstream investment.**

Under IFI Rules - What can be done directly,
can be done indirectly!

Analysis of Swap 7: FOCC swapping shares of an ICO to acquire another ICO

- ▶ FCO is acquiring equity instruments in swap of equity instruments
- ▶ Permitted

- ▶ ICO 1, an Indian company is acquiring shares of another Indian company ICO2 in swap of shares of a third Indian company, ICO3 held by it
- ▶ Due to IFI provisions, ICO 1 needs to follow all FEMA rules for FDI even though all transactions are within India
- ▶ Only a “Person Resident outside India” was permitted to acquire equity instruments through swap
- ▶ “FOCC” was not specifically permitted

- ▶ Clarification brought in Master Direction on 20th January 2025
- ▶ What has been directly allowed to NRs is permitted to FOCCs also.

- ▶ Is this a retrospective clarification or a prospective amendment?
 - ▶ No corresponding amendment in NDI Rules

What is not possible

- ▶ **Cross-border swaps are not possible for:**
- ▶ **ODI by Resident Individuals:** Resident individuals can acquire foreign securities by way of swap – only in case merger, demerger, amalgamation or liquidation
- ▶ **FDI in LLP:** FDI in LLP or its disinvestment cannot be done by way of swap as ‘equity instruments’ and ‘equity capital’ cover securities issued only by companies

Overseas Portfolio Investment

OI Rules

- ▶ **Investment in foreign securities**
- ▶ **Following not permitted as OPI:**
 - ▶ Investment classified as ODI
 - ▶ Unlisted debt instrument
 - ▶ Security issued by a resident, who is not in an IFSC
 - ▶ Derivatives and commodities
- ▶ Bonds of Indian companies listed on foreign stock exchanges
 - ▶ Not permitted (Security issued by a resident)

Para 1(ix)(e) of OI Directions

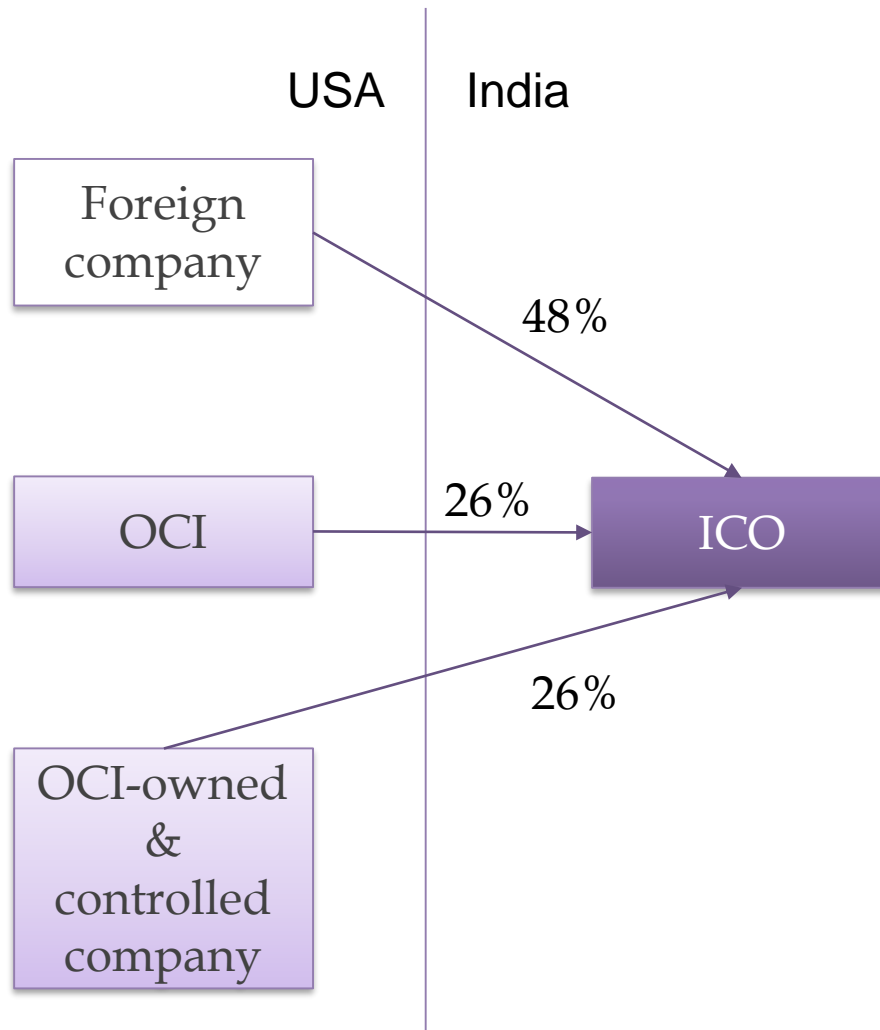
- ▶ The investment (including sponsor contribution) in **units** of any **investment fund overseas, duly regulated** by the regulator for the financial sector in the host jurisdiction, shall be considered as OPI.
- ▶ In several countries such as Singapore, the Fund is not regulated. The Fund Manager is regulated.
- ▶ This posed as a restriction on investment in such Funds which were regulated.
- ▶ Also, Investment Fund may not always issue “units”
- ▶ It can be capital interest in the entity
 - ▶ Most common being LP-GP structure

A.P. (DIR Series) Circular No. 09 dated June 7, 2024

- ▶ The investment (including sponsor contribution) in units **or any other instrument (by whatever name called)** issued by an investment fund overseas, duly regulated by the regulator for the financial sector in the host jurisdiction, shall be treated as OPI....
- ▶ **Explanation: ‘investment fund overseas, duly regulated’ for the purpose of this para shall also include funds whose activities are regulated by financial sector regulator of host country or jurisdiction through a fund manager.**
- ▶ Both issues have been addressed through this circular

**Non-repatriable investments
excluded from IFI calculation**

Exclusion from IFI calculation – Investment on a non-repatriation basis by “OCIs” and “entities owned & controlled by NRI/OCI”



- ▶ A foreign company has made 48% FDI in an Indian company, ICO.
- ▶ An OCI and his foreign company own the balance shareholding on non-repatriation basis.

Till 16 th August 2024	From 16 th August 2024
ICO is an FOCC	ICO not an FOCC

Amendments in NDI Rules

- ▶ **Erstwhile position effective from 6th August 2021:**
- ▶ Explanation: An investment made by an Indian entity which is owned and controlled by **NRI(s), on a non-repatriation basis**, shall not be considered for calculation of indirect foreign investment
- ▶ **From 16th August 2024:**
- ▶ “Explanation. — An investment made by an Indian entity which is owned and controlled by a Non-Resident Indian **or an Overseas Citizen of India including a company, a trust and a partnership firm incorporated outside India and owned and controlled by a Non-Resident Indian or an Overseas Citizen of India**, on a non-repatriation basis **in compliance with Schedule IV of these rules**, shall not be considered for calculation of indirect foreign investment.”.
- ▶ Along with NRI holdings, holdings by “OCIs” and “entities controlled by NRI/ OCI” to be excluded from IFI calculation
 - ▶ Entities cover company, trust or partnership firm **incorporated** outside India
- ▶ Investment on non-repatriation basis – **“in compliance with Schedule IV”** – added
 - ▶ Does it cover holding under Section 6(5) of FEMA?

Reclassification of FPI to FDI

A.P. (DIR Series) Circular No. 19 dated November 11, 2024

- ▶ If total holding of FPI exceeds 10%,
 - ▶ Option 1: Divest the holding
 - ▶ Option 2: Reclassify the holding as FDI
- ▶ **Time limit:** 5 trading days from the settlement date resulting in breach of holding
- ▶ Operational framework for reclassification of FPI to FDI notified in November 2024

Operational framework – Main features

- ▶ Approvals, wherever applicable, to be obtained
- ▶ Sectoral restrictions of FDI apply
- ▶ FDI Reporting to be done
- ▶ Get the holdings transferred by the custodial from FPI-designated demat to FDI-designated demat account
- ▶ Once reclassified as FDI, subsequent reduction below 10% threshold will not again change the holding

LRS in IFSC

LRS liberalized to open FCA in IFSC

- ▶ **RBI expands the scope of Foreign Currency Account held by Residents in IFSC:**
- ▶ Remittances under LRS to IFSCs could be made by Residents only for:
 - ▶ a. Making investments in IFSCs in securities except those issued by entities/ companies resident in India (outside IFSC); and
 - ▶ b. Payment of fees for education to foreign universities or foreign institutions in IFSCs for pursuing gazetted courses.
- ▶ RBI has, from 10th July 2024, decided that Authorised Persons may facilitate remittances for all permissible purposes under LRS to IFSCs for:
 - ▶ a. Availing financial services or financial products as per the International Financial Services Centres Authority Act, 2019 within IFSCs; and
 - ▶ b. All current or capital account transactions, in any other foreign jurisdiction (other than IFSCs) through an FCA held in IFSCs.
- ▶ **This brings FCA in IFSC at par with FCA in any other foreign jurisdiction for remittances of all current and capital account transactions covered under the LRS.**
- ▶ **[A.P. (DIR SERIES 2024-25) CIRCULAR NO. 15, DATED 10-7-2024]**
- ▶ **Parallel amendments made in IFSCA Regulations for IBUs**

Foreign Currency Account in IFSC

- ▶ The opening of FCA was permitted only for –
 - ▶ Making Investments in IFSC (except resident entities/ resident companies) and
 - ▶ Payment of fees for education to foreign universities in IFSC.
- ▶ IBU shall now permit use of funds remitted to FCA for availing financial products or financial services within IFSCs.
- ▶ **Exception: Fixed Deposits may be offered to RI provided the tenure is less than 180 days. Further, compliance with general direction no. vi) to be fulfilled if not reinvested.**
- ▶ This new circular shall facilitate RIs to open FCA with IBUs for LRS transactions instead of relying on offshore banks.
- ▶ Circular No. IFSCA-FMPP0BR/1/2021 –Banking Part – (1)/3 Dated-13th December, 2024

Directions by IFSCA to IBUs for Operating FCA of Indian Resident individuals opened under LRS

i) Permit RIs to open FCA for -

a. Receiving remittances under LRS from Onshore India

b. Receiving remittances from other than Onshore India

ii) Monitor that remittance in FCA are within reasonable time after opening A/c

iii) Ensure all remittances are routed through Authorised Person (AP)

iv) Obtain copy of return submitted by RI to AP under LRS

v) Obtain declaration from RI for remittances into FCA from locations other than Onshore India

Directions to IBUs for Operating FCA of Indian Resident individuals opened under LRS – GENERAL DIRECTIONS

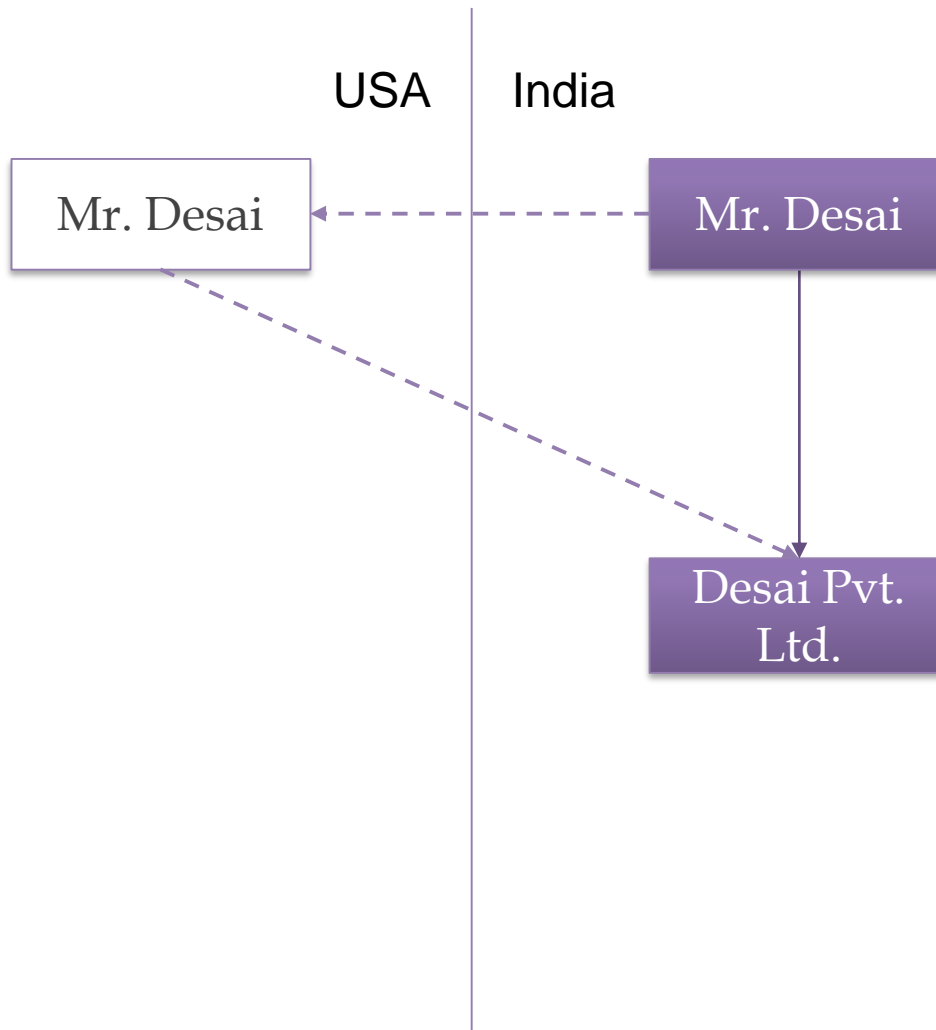
vi) Obtain declaration from RI that received/realised/unspent/unused 'foreign exchange' from Onshore India or otherwise in FCA, unless reinvested within 180 days through an AP in designated in AD Bank

vii) Obtain declaration from RI that he shall not settle any domestic transactions with other RI through FCA

viii) Ensure compliance with IFSCA (Anti Money Laundering, Counter-Terrorist Financing and Know Your Customer) Guidelines, 2022 and circulars thereof

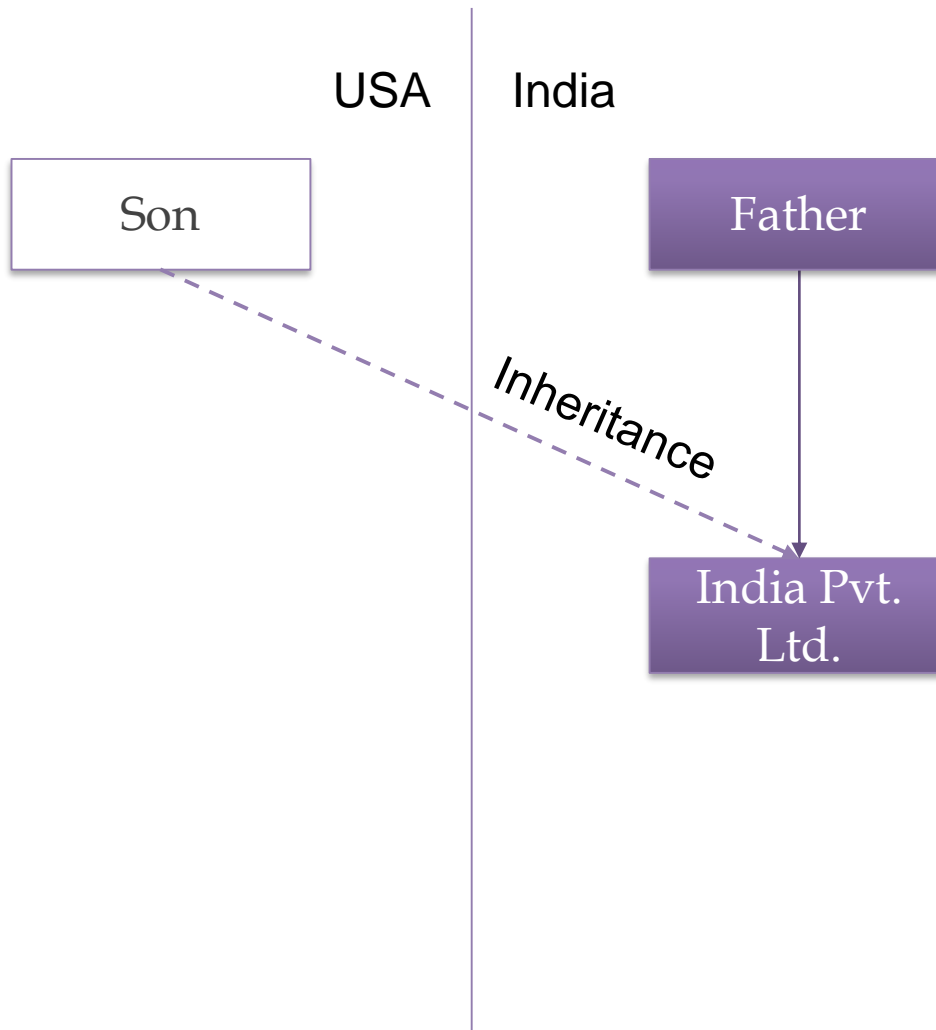
Other changes in Master Direction on Foreign Investment in India

Clarification of holding for Emigrating Indians



- ▶ **In case of change of residential status of a person resident in India to a person resident outside India, the investment shall be considered on non-repatriation basis.**
- ▶ Thus, Mr. Desai can hold shares of Desai Pvt. Ltd., but on non-rep basis.
- ▶ Applies to business as well as portfolio investment

Clarification of holding for Non-resident heirs of Indians



- ▶ **In case of death of a person resident in India and consequent transmission of equity instruments held by the person resident in India to non-resident legal heir by way of inheritance, the inherited equity instruments shall be held on non-repatriation basis and, therefore, reporting for the said transaction shall not be required.**
- ▶ Applies to business as well as portfolio investment

Definition of 'Control' under NDI Rules - Streamlined

- ▶ **Control shall have the same meaning as assigned to it in the Companies Act, 2013 and for the purposes of Limited Liability Partnership, shall mean the right to appoint majority of the designated partners, where such designated partners, with specific exclusion to others, have control over all the policies of an LLP.**
- ▶ **Section 2(27) of Companies Act 2013:**
- ▶ "control" shall include the right to appoint majority of the directors or to control the 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 or in any other manner

Definition of 'Control' – Background

- ▶ Definition of control under NDI Rules is relevant for:
 - ▶ Downstream investment provisions (to determine whether a company qualifies as FOCC); and
 - ▶ As part of condition for allowing FPIs till 49%
 - ▶ FPI provisions (to determine if there is common control by FPIs)
- ▶ Earlier, Rule 2, Rule 23 and Schedule II all provided a definition of control
- ▶ Brought parity in the definition of control across all provisions
- ▶ Definition of control removed from Rule 23 and Schedule II
- ▶ Definition in Rule 2 was substituted and made in line with the definition under Companies Act 2013
- ▶ The definition of “Control” was provided in Rule 2 of NDI Rules. However, it was not included in the Master Direction. It has now been inserted in the Master Direction
 - ▶ However, they have missed to remove the old definition of control from the Indirect Foreign Investment paragraph in Master Direction

Amendment in FPI provisions in NDI Rules

- ▶ Definition of control was provided in Schedule II
- ▶ *Explanation:* In case, two or more FPI's including foreign Governments/their related entities are having common ownership, directly or indirectly, of more than fifty percent or common control, all such FPI's shall be treated as forming part of an investor group. **Control includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of shareholding or management rights or shareholders agreements or voting agreements or in any other manner.**
- ▶ Above Explanation is now substituted by Foreign Exchange Management (Non-Debt Instruments) (Fourth Amendment) Rules, 2024 - Notification S.O. 3492(E) [F. NO. 1/8/2024-EM], dated 16-8-2024
- ▶ **Explanation— In case two or more FPI's including foreign Governments or their related entities are having common ownership, directly or indirectly, of more than fifty per cent or common control, all such FPI's shall be treated as forming part of an investor group.**

Corresponding change in Master Direction

- ▶ Annex 2
- ▶ **1. Purchase/ sale of equity instruments**
- ▶ 1.1 A Foreign Portfolio Investor (FPI) may purchase or sell equity instruments of an Indian company on a recognised stock exchange in India.
- ▶ **Explanation, – In case two or more FPIs including foreign Governments, or their related entities are having common ownership, directly or indirectly, of more than fifty percent or common control, all such FPIs shall be treated as forming part of an investor group.**

Changes in Master Direction

Change in Master Direction	Analysis
Definition of Indian company inserted	The definition of Indian company was not present in Master Direction. It has now been included.
New condition inserted for transfer involving deferred payment, etc.	Where transfer involves deferred payment, escrow arrangement or indemnification, the Share transfer agreement should include the respective clause & related conditions for such arrangement.
All requests to be made to DPIIT	For clarification regarding foreign investment in a sector or related conditions, request to be made to DPIIT
Cases requiring minimum NOF	Clarity brought on handling of FDI in cases requiring minimum Net Owned Funds prescribed by financial sectors regulators.
Allotment of unsubscribed rights	Indian company can allot shares to non-residents out of unsubscribed rights. It shall be subject to entry routes, sectoral caps or investment limits, pricing guidelines and other attendant conditions as applicable.

Changes in Master Direction

Change in Master Direction	Analysis
Definition of 'ESOP'; "Share Based Employee Benefits"; and "sweat equity shares" inserted.	Definitions were provided in Rule 2 of NDI Rules. However, it was not included in the Master Direction. It has now been inserted in the Master Direction.
Provided that a Multilateral Bank or Fund, of which India is a member, shall not be treated as an entity of a particular country nor shall any country be treated as the beneficial owner of the investments of such Bank or Fund in India. - Inserted.	This was provided as Proviso to Rule 6(a) of NDI Rules. However, it was not included in the Master Direction. It has now been inserted in the Master Direction.
Meaning of 'Share Warrants'; 'Convertible debentures'; 'Preference shares' inserted.	The meaning of "Share warrants" was provided in explanation to definition of equity instruments in Rule 2 of NDI Rules. However, it was not included in the Master Direction. It has now been inserted in the Master Direction.

Changes in Master Direction

Change in Master Direction	Analysis
Change in tenor of fully and mandatorily Convertible debentures and fully and mandatorily Convertible preference shares.	Aligned with the provisions of Companies Act, 2013.
Pricing guidelines for fully and mandatorily Convertible debentures and fully and mandatorily Convertible preference shares inserted.	Pricing guidelines in case of convertible equity shares was provided in NDI Rules. The same will apply in case of convertible debentures. Hence inserted in the Master Direction.
The aggregate limit of foreign portfolio investment by FPIs under schedule II to the FEM (NDI) Rules, 2019 with respect to an Indian company engaged in a prohibited sector for FDI shall be 24 per cent.	It was provided in Schedule II of NDI Rules. However, it was not included in the Master Direction. It has now been inserted in the Master Direction.

Changes in Master Direction

Change in Master Direction	Analysis
Sectoral restrictions for FVCI removed for investment in startup companies	FVCIs are permitted to invest in unlisted securities of Indian companies engaged in 11 specified sectors. This sectoral restriction is removed where the Indian company is a startup. In case of equity instruments – sectoral caps, entry routes and attendant conditions continue to apply.
References to RBI streamlined	Reference to be made by nodal officer to regional office of Reserve Bank. Jurisdiction of regional office shall be as per the registered office of the Indian investee entity.
Sch. IV investment clarified to be excluded from IFI calculation	Earlier, only NRI investments were mentioned to be excluded from IFI calculation. Now, OCIs and entities owned and controlled by NRIs/ OCIs are also covered.
Reporting required on reclassification to FOCC	Reporting requirements extended to reclassification of FOCC. Form DI to be filed within 30 days of reclassification .

Changes in Compounding Rules

Changes in Compounding Proceedings

- ▶ Foreign Exchange (Compounding Proceedings) Rules, 2024 introduced vide Notification G.S.R. 566(E) dated 12th September 2024.
- ▶ In supersession of Foreign Exchange (Compounding Proceedings) Rules, 2000.
- ▶ **Key Changes:**
 - ▶ Dedicated rule (Rule 9) for contraventions that cannot be compounded.
 - ▶ Compounding allowed even if appeal filed u/s 17 or 19.
 - ▶ Increase in threshold limits of amount involved in contravention for Compounding by RBI Officers.
 - ▶ Introduction of Digital Payment Options.
 - ▶ Mode of submission of application – physical or online.
 - ▶ Increase in compounding application fees to Rs. 10,000 + GST @ 18%.
 - ▶ Revision in Compounding application documents format.

Compounding Proceedings Rules – Non-compoundable Cases

- ▶ **Non-Compoundable Cases:** A dedicated new Rule 9 is introduced to specifically list out the cases that cannot be compounded.
- ▶ **Non-compoundable cases now added in Rules:**
 - ▶ Where the provisions of section 37A of the Act are applicable - was earlier present in Master Direction.
 - ▶ Where the adjudicating officer has passed a penalty order u/s 13.
 - ▶ Where the Compounding Authority is of the view that further investigation by ED is necessary to determine the amount of the contravention u/s 13.
- ▶ **Cases already covered in erstwhile Rules as non-compoundable:**
 - ▶ Where the Directorate of Enforcement is of the view that the proceeding relates to a serious contravention suspected of money laundering, terror financing or affecting the sovereignty and integrity of the nation, the compounding authority shall not proceed with the matter and shall remit the case to the appropriate Adjudicating Authority for adjudicating contravention under section 13;
 - ▶ Where the amount involved is not quantifiable;

Compounding Proceedings – Threshold Limits

- ▶ Changes in threshold limits for compounding authorities of RBI based on the sum involved in contravention:

Compounding Authority	Sum involved in Contravention (Erstwhile Compounding Rules)	Sum involved in Contravention (Present Compounding Rules)
Assistant General Manager	Upto Rs. 10,00,000	Upto Rs. 60,00,000
Deputy General Manager	Rs. 10,00,001 to Rs. 40,00,000	Rs. 60,00,001 to Rs. 2,50,00,000
General Manager	Rs. 40,00,001 to Rs. 1,00,00,000	Rs. 2,50,00,001 to Rs. 5,00,00,000
Chief General Manager	More than Rs. 1,00,00,000	More than Rs. 5,00,00,000

Compounding Proceedings - Comparative analysis

Particulars	Erstwhile Compounding Rules/ Master Direction	Present Compounding Rules/ Master Direction
Mode of Submission of compounding application	Physical	Physical or Online through PRAVAAH portal
Compounding Application fees	Rs. 5,000/- (including GST)	Rs. 10,000/- plus GST @ 18%
Compounding in case an appeal has been filed u/s 17 or 19 of FEMA	Not allowed	Allowed
Discontinuation of adjudication in case contraventions have been compounded before the completion of the adjudication process u/s 16 of FEMA.	No inquiry shall be held	No inquiry shall be initiated or continued.

Compounding Proceedings - Comparative analysis

Particulars	Erstwhile Compounding Rules/ Master Direction	Present Compounding Rules/ Master Direction
Submission of latest audited balance sheet along with compounding application	Required	No such requirement in the present MD.
Application fees in case of return of Compounding application	Fees to be returned with the application.	Fees will not be returned. If application is re-submitted, then fees need not be paid again. (Para 3.5 of MD)
Powers of compounding authority	Power to request any information, records, or documents related to the contravention.	Apart from earlier powers, also empowered to instruct the applicant to take any necessary action with respect to transactions involved in the contravention. (Rule 8)

Compounding Proceedings – Revisions in formats

- ▶ **Revision in Compounding application documents format:**
- ▶ **Compounding Form**
- ▶ Need to mention whether any notice has been issued under rule 4 of Adjudication Proceedings and Appeal Rules. If yes, then need to furnish further details of the said notice.
- ▶ Need to mention whether any compounding order had been passed against an application submitted previously by the applicant? If yes, then need to furnish further details of the said compounding application and order.
- ▶ **Included Undertaking on ED investigation:** To immediately inform in writing, if any investigation proceedings are initiated by ED or the adjudication order is passed by the adjudicating authority before issuance of the compounding order in respect of the compounding application filed.
- ▶ ECS Mandate now merged with Compounding Form.
- ▶ GSTIN (if applicable) is now mandatorily required to be filled in.

Compounding Proceedings – Revisions in formats

▶ **Declaration / Undertaking:**

- ▶ The declaration for no appeal has been filed u/s 17 or 19 has now been removed.
- ▶ Included Declaration that no adjudication order has been passed and to inform immediately, in writing, if any such order is passed before the date of issuance of the compounding order in respect of the compounding application filed.

▶ **Introduction of Digital Payment Options:**

- ▶ Earlier payments only through DD.
- ▶ Compounding application fees can now be paid through DD or NEFT or other permissible electronic or online modes.
- ▶ Compounded amount can now be paid through DD, RTGS or NEFT or other permissible electronic or online modes.
- ▶ If paid through online modes, then intimate regarding the same to RBI not later than 2 hours through email (format prescribed).

Introduction of PRAVAAH portal

PRAVAAH Portal

- ▶ The Reserve Bank of India (RBI) launched the 'PRAVAAH' (Platform for Regulatory Application, Validation and Authorisation) portal.
- ▶ Press Release: 2024-2025/393 dated 28th May 2024.
- ▶ User Manual and FAQs dated 1st July 2024 also issued for Users.
- ▶ **Main benefits:**
 - ▶ Can submit applications online.
 - ▶ Can track and monitor the status of application.
 - ▶ Can respond to any clarification/query sought by RBI.
 - ▶ Status updates sent to applicant through SMS and Email.
 - ▶ Can view or download previous applications.
- ▶ Reports are there of some glitches still prevalent in the Portal

PRAVAAH Portal

- ▶ **Display of time limits for deciding on applications/approvals sought.**
- ▶ **Applicants can fill out the form in one go or save it as a draft.** On the next login by the user, they can start filling in the details in the remaining tabs.
- ▶ If departments are likely to exceed the timeline, they will revert to the applicant.
- ▶ **In case of missed, incorrect, or additional details, applicants can upload documents even after the application is submitted.**
- ▶ Applications for some categories need to be submitted through AD Banks only while the applications for other categories can be submitted by the applicant directly. The details are mentioned in User Manual.
- ▶ **The applicant needs to register on the portal every time for submitting a new application.** However, the application history can be checked, or additional documents can be submitted through registered mobile number, for the already submitted applications.
- ▶ Applications submitted outside PRAVAAH cannot be tracked through PRAVAAH portal.

**Other FEMA Updates -
Other Recent Changes in FDI**

Liberalisation for FDI in Space Sector

- ▶ **FDI norms liberalised to allow FDI in space sector under Automatic route**
- ▶ Under the extant policy, FDI was permitted in establishment and operation of Satellites through the Government approval route only. The FDI policy on Space sector has now been eased by prescribing liberalized thresholds in various sub-sectors or activities under the Automatic Route:
- ▶ **Upto 74% under Automatic route:** Satellites-Manufacturing & Operation, Satellite Data Products and Ground Segment & User Segment. Beyond 74% these activities are under government route.
- ▶ **Upto 49% under Automatic route:** Launch Vehicles and associated systems or subsystems, Creation of Spaceports for launching and receiving Spacecraft. Beyond 49% these activities are under government route.
- ▶ **Upto 100% under Automatic route:** Manufacturing of components and systems/ sub-systems for satellites, ground segment and user segment.
- ▶ The investee entity shall be subject to sectoral guidelines as issued by the Department of Space from time to time.
- ▶ **Press Note No. 1 (2024 series), dated 4-3-2024 and [FEM (Non-Debt Instruments) (Third Amendment) Rules, 2024 vide Notification S.O. 1722(E) [F. NO. 1/5/EM/2019], dated 16-4-2024]**

Sovereign Green Bonds

- ▶ **RBI includes 10-year Sovereign Green Bonds as eligible for non-resident investment under Fully Accessible Route**
- ▶ Certain specified categories of Central Government securities were opened fully for non-resident investors without any restrictions under the Fully Accessible Route introduced vide A.P. (DIR Series) Circular No. 25 dated March 30, 2020. It has now been decided to also designate Sovereign Green Bonds of 10-year tenor issued by the Government in the second half of the fiscal year 2024-25 as 'specified securities' under the Fully Accessible Route.
- ▶ Circular NO. FMRD.FMD.NO.06/14.01.006/2024-25 dated 7th November 2024

- ▶ **RBI allows non-residents to trade Sovereign Green Bonds in IFSC**
- ▶ RBI has notified an amendment to Schedule 1 of FEM (Debt Instruments) Regulations, 2019. Now, persons resident outside India can purchase/sell Sovereign Green Bonds issued by the Government of India by maintaining a securities account with a depository in IFSC in India. The amount of purchase consideration must be paid out of inward remittance from abroad via banking channels or out of funds held in a foreign currency account maintained in accordance with the regulations issued by the RBI and/or the IFSCA.
- ▶ Foreign Exchange Management (Debt Instruments) (Third Amendment) Regulations, 2024, Notification No. FEMA.396(3)/2024-RB

Master Direction on Investment in Debt Instruments

- ▶ **Master Direction issued for investment in Debt Instruments by Non-residents:**
- ▶ The Reserve Bank of India has issued Master Direction on Non-resident Investment in Debt Instruments in India. While it does not consolidate all existing provisions for debt investment by non-residents, it provides additional guidance on the channels for such investment like eligibility of investors to invest in various types of debt instruments; the limits & conditions; exit provisions, etc.
- ▶ [FMRD.FMD.No.10/14.01.006/2024-25 dated 7th January 2025]

Exchange Traded Currency Derivatives

- ▶ **RBI's clarification on Exchange Traded Currency Derivatives**
- ▶ RBI's A.P. (DIR Series) Circular No. 13, dated January 5, 2024 sets out the Master Direction and reiterates the regulatory framework for participation in ETCDs involving the INR. There were concerns that ETCD contracts entered into without the purpose of hedging a contracted exposure now stand disallowed. RBI has clarified that ETCD contracts are permitted only for the purpose of hedging of exposure to foreign exchange rate risks and earlier circular exempting documentary evidence for positions taken upto USD 10 million per exchange did not provide any exemption from the requirement of having the exposure. The consolidated Master Direction was to come into effect from 5th April 2024 but has been postponed now to 3rd May 2024.
- ▶ **[RBI Press Release No. 32/2024-25, dated 4-4-2024]**

Other changes

Master Direction on Overseas Investment

- ▶ **RBI issues Master Direction on Overseas Investment**
- ▶ RBI had issued a new Overseas Investment Regime in August 2022 with Overseas Investment Rules and Overseas Investment Regulations. Further, RBI had also issued Overseas Investment Directions as operational directions for AD Banks. RBI has now issued the Master Direction on Overseas Investment (OI). This Master Direction compiles the August 2022 Directions and the amendment in these directions made in June 2024. Like the earlier Directions, these are addressed to the AD Banks as instructions to be followed with a view to implement the aforesaid OI Rules and OI Regulations. It should be noted that unlike other Master Directions, this Master Direction only compiles the OI Directions and amendments thereto. It does not cover the OI Rules and OI Regulations and thus does not act as a stand-alone comprehensive document. Those referring to this Master Direction should refer to the OI Rules and OI Regulations too for a complete understanding of all the applicable provisions.
- ▶ [FED Master Direction No. 15/2024-25 issued on 24th July 2024]

Funds raised on overseas listing

- ▶ **Funds raised on overseas listing by Indian companies permitted to be held in abroad in foreign currency:**
- ▶ Recently, Indian companies have been permitted to list their equity shares on International Exchanges. FEMA Notification 10(R) – FEM (Foreign Currency Accounts By A Person Resident In India) Regulations, 2015, has been amended to permit Indian companies to hold funds raised through direct listing of equity shares on International Exchanges in foreign currency accounts with a bank outside India.
- ▶ **[FEM (Foreign Currency Accounts by a Person Resident In India) (Amendment) Regulations, 2024. Notification No. FEMA. 10R(3)/2024-RB, dated 19-4-2024]**

Account to post and collect margins in India

- ▶ **Non-residents permitted to open interest-bearing account for posting and collecting margins in India for permitted derivative contracts:**
- ▶ RBI has notified the FEM (Deposit) (Fourth Amendment) Regulations, 2024. Sub-regulation (6) has been inserted to Regulation 7. As per the amended norms, an authorised dealer in India may allow a person resident outside India to open, hold and maintain an interest-bearing account in Indian Rupees and/or foreign currency for posting and collecting margins in India for permitted derivative contracts entered into by such person as per FEM (Margin for Derivative Contracts) Regulations, 2020.
- ▶ **[Foreign Exchange Management (Deposit) (Fourth Amendment) Regulations, 2024, Notification No. F. No. FEMA 5(R)/(4)/2024-RB dated 6th May 2024]**

Definition of Startup aligned

- ▶ **RBI amends FEMA Notification 10(R) to align it with the updated definition of 'startup'**
- ▶ The Reserve Bank of India has notified Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) (Fourth Amendment) Regulations, 2024. The amended norms replace the definition of the startup with the revised definition of startups, which was issued by the Department for Promotion of Industry and Internal Trade in 2019.
- ▶ [FEM (Foreign Currency Accounts by a Person Resident in India) (Fourth Amendment) Regulations, 2024 dated 19th October 2024]

Unauthorised entities providing forex facilities to residents

- ▶ **RBI raises caution against unauthorised entities providing forex facilities to residents:**
- ▶ RBI has raised caution against unauthorised entities offering foreign exchange (forex) trading facilities to Indian residents with promises of disproportionate/exorbitant returns. Such entities take recourse to engaging local agents who open accounts at different bank branches for collecting money towards margin, investment, charges, etc. These accounts are opened in the name of individuals, proprietary concerns, trading firms, etc., and the transactions in such accounts are not found to be commensurate with the stated purpose for opening the account in several cases. RBI has also observed that these entities are providing options to residents to remit/deposit funds in Rupees for undertaking unauthorised forex transactions using domestic payment systems like online transfers, payment gateways, etc. RBI has brought FEMA provisions and other directions issued by them to the attention of the Authorised Dealer Banks and advised them to be more vigilant and exercise greater caution in this regard. Further, RBI has mandated such AD Cat-I banks to report an account being used to facilitate unauthorised forex trading to the Directorate of Enforcement, Government of India.
- ▶ **[A.P. (DIR Series 2024-25) Circular No. 2, dated 24-4-2024]**

Current Account for settlement of export and import transactions in INR

- ▶ Facility to AD Banks for opening additional current account for settlement of export transactions now extended for settlement of import transactions as well:
- ▶ AD Category-I banks who maintain Special Rupee Vostro Account vide A.P. (DIR Series) Circular No. 10, dated July 11, 2022 on International Trade Settlement in Indian Rupees (INR) were earlier permitted to open an additional special current account for its constituents, exclusively for settlement of export transactions. Now, this facility has been extended for import transactions as well.
- ▶ **[RBI FED Circular NO. 11, dated 11-6-2024]**

Draft Import and Export Regulations

- ▶ **Draft Import and Export Regulations issued for public response:**
- ▶ The Notifications dealing with Import and Export are in force since RBI has decided to rationalise regulations that cover export and import transactions. The proposed regulations are intended to promote ease of doing business, especially for small exporters and importers. They are also intended to empower Authorised Dealer banks to provide quicker and more efficient service to their foreign exchange customers. The draft regulations under FEMA and draft directions meant for Authorised Dealer banks are available online on RBI's website for public response. Comments/feedback on the draft proposals (regulations as well as directions) may be forwarded by September 01, 2024. Readers are welcome to share their feedback with BCAS which will compile and share response to RBI.
- ▶ [Press Release: 2024-2025/615 dated 2nd July 2024]
- ▶ **Final regulations are still not out**

LRS Amendments

- ▶ **Limits applicable on remittances allowed with online filing of Form A2 now removed:**
- ▶ RBI has allowed online filing of Form A2 for remittances for transactions with an upper limit of USD 25,000 for individuals and USD 100,000 for corporates. RBI has now decided to allow remittance through online filing of Form A2 without any limit.
- ▶ **[A.P. (DIR SERIES 2024-25) CIRCULAR NO. 12, DATED 3-7-2024]**

- ▶ **Form A2 applicable for all cross-border remittances:**
- ▶ For any current account transaction upto USD 25,000 Authorised Dealers are permitted to release foreign exchange on the basis of a simple letter containing basic information. No other documents were required including Form A2. However, RBI has now decided that Authorised Dealers shall obtain Form A2 in physical or digital form for all cross-border remittances irrespective of the value of transaction.
- ▶ **A.P. (DIR SERIES 2024-25) CIRCULAR NO. 13, DATED 3-7-2024**

LRS Reporting Changes

- ▶ **Discontinuation of monthly LRS returns to be submitted by Banks**
- ▶ AD Category-I banks were required to furnish information on the number of applications received and total amount remitted under LRS on a monthly basis in the Centralised Information Management System (CIMS). This requirement has been discontinued from the reporting month of September 2024. The banks will be required to upload only transaction-wise information under LRS daily return at the close of business of the next working day.
- ▶ The Master Direction -Reporting under Foreign Exchange Management Act, 1999 has also been updated to reflect this change.
- ▶ **A.P. (DIR SERIES 2024-25) Circular No. 16, dated 6-9-2024**

Overseas Guarantees

- ▶ **RBI mandates AD Banks to exercise diligence for overseas guarantees availed by residents**
- ▶ The RBI has issued a circular directing AD Category-I banks may ensure that guarantee contracts advised by them to, or on behalf of, their resident constituents are in accordance with the FEMA regulations. This is on account of RBI coming across instances of guarantees, including Standby Letters of Credit [SBLCs] and/or performance guarantees, which are issued by persons resident outside India, favouring persons resident in India, which are not permitted as per the present FEMA regulations.
- ▶ A.P. (DIR SERIES 2024-25) Circular No. 18, dated 04-10-2024

Change in FIRMS Portal and Reporting requirements

Developments in FIRMS Portal

▶ Entity User and Entity Master:

- ▶ The definition of a startup company has been changed under NDI Rules. Accordingly, the said startup company is eligible to be registered in the FIRMS portal.
- ▶ Earlier only contact information for FIRMS helpdesk was provided. Now a list of Contact information has been provided at the FIRMS Portal (homepage). Users need to contact their AD Bank or respective Regional Office.
- ▶ Guidance for changing Email id/Contact Number of Entity User provided in User Manual.
- ▶ Requests for modification in entity master details can now be submitted in prescribed format (over mail/ physically) to their respective Regional Office instead of 'fedsupport@rbi.org.in' and 'helpfirms@rbi.org.in'. A list of Regional Offices of RBI has been provided for reference of Users.

Developments in FIRMS Portal

▶ **Business User and Single Master Form (SMF):**

- ▶ Auto-acknowledgement of SMF.
- ▶ Online calculation of LSF.
- ▶ Online Payment of LSF through NEFT/RTGS.
 - ▶ Payment only in the account of concerned Regional Office (RO) of RBI. Account details of RO has been provided in User Manual.
 - ▶ Need to mention 'Form Reference Number' of the reporting in "Remark's" column of the NEFT/RTGS transaction.
 - ▶ Intimate RO regarding payment through email. Format of email and Contact information has been provided in User Manual.
 - ▶ Any incorrect amount or payment to different Regional Office will be refunded.
- ▶ Guidance for changing Email id/Contact Number of Business User provided in User Manual.
- ▶ Guidance on how to fill the details in various Forms in case of reclassification of foreign portfolio investment by FPI to FDI is now provided in User Manual.

Developments in FIRMS Portal

▶ FC-GPR

- ▶ Value of issue price p.u. for bonus issue is to be entered as 0(zero). (w.e.f. 21.09.2024)
- ▶ While reporting the details of issue, the applicant needs to attach the Valuation certificate for Fair value of shares. However, the same is not possible in case of subscription to MoA. In that case, the Board Resolution/copy of MoA may be attached. (w.e.f. 21.09.2024)
- ▶ Other Reporting Guidelines have been issued as part of User Manual for reporting for reclassification of FPI to FDI. (w.e.f. 03.01.2025)

Developments in FIRMS Portal

▶ FCTRS

- ▶ In case of transfer of equity instruments of an Indian Co. by a PROI to another Indian Co., which is not owned and not controlled by resident Indian citizens or is owned or controlled by persons resident outside India shall require reporting in Form FC-TRS. Further, such downstream investment shall also require reporting in Form DI. (w.e.f. 21.09.2024)
- ▶ Need to report whether FCTRS reporting is New or Subsequent. If subsequent, then need to report the previously filed FCTRS reference number. (w.e.f. 21.09.2024)
- ▶ Date of settlement will be treated as the date of transfer in case of sale/purchase on stock exchanges. (w.e.f. 21.09.2024)
- ▶ Other Reporting Guidelines have been issued as part of User Manual for reporting for reclassification of FPI to FDI. (w.e.f. 03.01.2025)

Developments in FIRMS Portal

▶ **LLP-I**

- ▶ Need to report the date & amount of capital contribution received. (w.e.f. 21.09.2024)
- ▶ Upon conversion of a co. to an LLP, if an FCGPR has already been reported for FDI originally received by the co., additional reporting in Form LLP-I would be applicable, only if LLP receives an additional capital contribution or on acquisition of profit share by a PROI in LLP. (w.e.f. 03.01.2025)

▶ **Form CN**

- ▶ Now there are only two transaction types (i.e., 'Issue of convertible notes' or 'Transfer of convertible notes'). Earlier there were two more options (i.e., 'Repayment' or 'Conversion of Convertible Notes') which have been removed. (w.e.f. 21.09.2024)

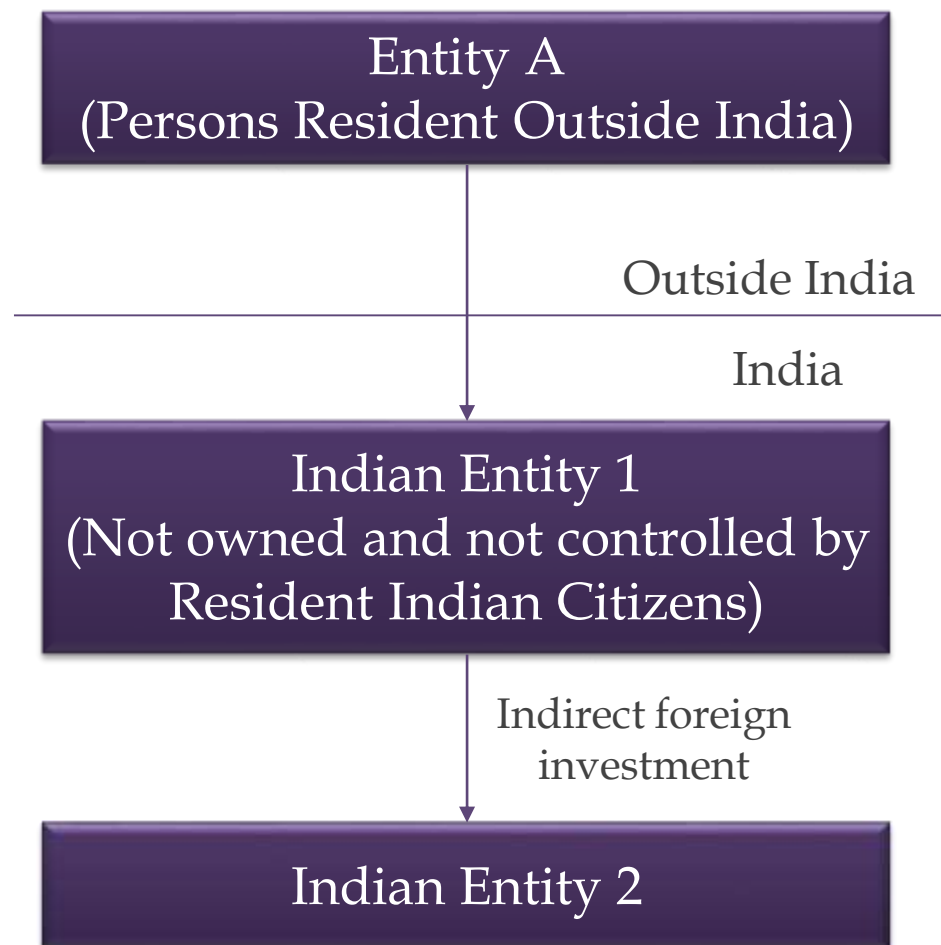
Developments in FIRMS Portal

▶ Form DI

- ▶ Need to report the FCTRS number if continuous to FCTRS i.e., a transfer of shares from R to NR, or vice versa, has happened previously. (w.e.f. 20.10.2023)
- ▶ Guidance on how to fill the details in case of LLP capital contribution is now provided in User Manual. (w.e.f. 21.09.2024)
- ▶ Other Reporting Guidelines has been issued as part of User Manual for applicable reporting under various scenarios in case of downstream investments. (w.e.f. 21.09.2024)

Developments in FIRMS Portal

- ▶ **Reporting in case of Downstream Investments:** Applicable Reporting for downstream investment by an Indian entity which is not owned and not controlled by resident Indian citizens or is owned or controlled by persons resident outside India (Entity A) in another Indian entity which is considered as indirect foreign investment for Investee Indian entity. (w.e.f. 21.09.2024)



Developments in FIRMS Portal

► Reporting in case of Downstream Investments (Cont.):

Mode of Investment	Applicable Reporting
Issuance of equity instruments by an Indian Co. to Entity A	Form DI
Transfer of equity instruments of an Indian Co. from a PRII to Entity A	Form DI
Transfer of equity instruments of an Indian Co. from a PROI to Entity A	Form FCTRS & Form DI
Transfer of equity instruments of an Indian Co. from Entity A to PROI	Form FCTRS
Capital contribution/ acquisition of profit share of an LLP by Entity A	Form DI
Transfer of capital contribution/ profit share of an LLP from Entity A to a PROI	Form LLP-II
Transfer of capital contribution/ profit share of an LLP from PROI to Entity A	Form LLP-II and Form DI

Developments in FIRMS Portal

▶ Form ESOP

- ▶ Other Reporting Guidelines has been issued as part of User Manual for reporting related to exercise of options using trust route and/or cashless mechanism. (w.e.f. 21.09.2024)

▶ Form DRR

- ▶ Depository Receipts for which Form DRR has been duly reported, need not report again on cancellation. (w.e.f. 21.09.2024)

▶ Form INVI

- ▶ In case of partly paid units, each tranche needs to be reported separately. (w.e.f. 21.09.2024)

Developments in FIRMS Portal

► Changes in document requirements:

- For Business User Registration, applicants can attach any Govt. issued identification document. (Earlier only PAN was allowed) (w.e.f. 21.09.2024)
- For reclassification of FPI to FDI, relevant holding statement/ certificate from the concerned depository/ depository participant needs to be attached. (w.e.f. 21.09.2024)
- Along with Form FCTRS, for transfer by way of sale (Private Arrangement), the consent letter between agents (of buyer and seller) along with power of Attorney document can be attached. (Earlier requirement - consent letter between buyer and seller) (w.e.f. 20.10.2023)
- Along with Form FCTRS, for transfer by way of sale, a no objection/ Tax clearance Certificate from the Income Tax authority/ Chartered Accountant is also required to be attached. (w.e.f. 20.10.2023)

Developments in FIRMS Portal

▶ Changes in document requirements (Contd.):

- ▶ Along with Form LLP-I, also need to attach the relevant extracts of the agreement w.r.t. capital contribution. (w.e.f. 20.10.2023)
- ▶ Along with Form LLP-II, the consent letter between agents (of buyer and seller) along with power of Attorney document can be attached. (Earlier requirement - buyer and seller consent letter) (w.e.f. 20.10.2023)
- ▶ Along with Form LLP-II, a no objection/ Tax clearance Certificate from the Income Tax authority/ Chartered Accountant is also required to be attached. (w.e.f. 20.10.2023)
- ▶ Along with Form CN, also need to attach FIRC/Debit Statement; KYC; relevant extracts of Board resolution; CS certificate, as applicable (format prescribed); Declaration by authorised representative of Indian Co./ Startup (format prescribed). (w.e.f. 20.10.2023)

Developments in FIRMS Portal

▶ Changes in document requirements (Contd.):

- ▶ Along with Form ESOP, also need to attach a declaration by authorised representative of Indian Co. (format prescribed). (w.e.f. 20.10.2023)
- ▶ Along with Form DI, also need to attach a declaration by authorised representative of Unlisted Indian Co. (format prescribed). (w.e.f. 20.10.2023)
- ▶ Along with Form DRR, need to attach documents evidencing: (w.e.f. 21.09.2024)
 - ▶ details of issue certified by CS; and
 - ▶ amount of receipt of remittance.
- ▶ The valuation date (i.e., the date as on which the valuation is arrived/obtained) specified in a valuation certificate, should not be earlier than ninety days from the date of the transaction. An Illustration has been provided in the next slide. (w.e.f. 21.09.2024)

Developments in FIRMS Portal

▶ Changes in document requirements (Cont.):

▶ Illustration for Valuation Certificate:

Date of issuance of shares: 31.03.2024

Date of signing/issue of valuation certificate: 01.02.2024

(i.e., a date within 90 days prior to 31.03.2024)

Date as on which valuation has been obtained/arrived: 15.12.2023

(i.e., a date more than 90 days old as on 31.03.2024)

In the above case, the applicant need to resubmit a revised valuation certificate with a "valuation date" that is not later than 02.01.2024.

Conclusion

- ▶ Last few months have seen quite a few important amendments, especially related to cross-border restructuring
- ▶ However, FEMA is not the only regulation to consider Companies Act; Income-tax Act; Foreign Jurisdiction's laws; etc.
- ▶ Several clarifications mooted by way of changes to the Master Direction without any amendment in the Rules
- ▶ Stay updated about latest changes through the BCAS and CTC Monthly Journals

Questions?

- ▶ Thank you for a patient hearing
- ▶ Feedback: rutvik@rashminsanghvi.com
- ▶ Website: www.rashminsanghvi.com

- ▶ **Acknowledgements:**
- ▶ CA Nareshbhai Ajwani, CAs Bhavya Gandhi, Rajashree Jain & Manisha Tulsiani and Ms. Yashvi Rahate