Cross-border Restructuring under FEMA

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Presentation Layout

Sr. No.	Particulars
1	Background
2	Main Legal Provisions
3	Relevant FEMA Issues for Acquisitions, Mergers, Swaps, Externalisation, Reverse-Flip, Indirect Foreign Investment through Case Studies
4	Exit Routes and FEMA Impact
5	Latest FEMA Developments
6	Other relevant legal & practical considerations

FEMA – complex law

- FEMA is a policy law. It is not drafted in exact legal language.
- There are several differences between interpretation and practice.
- RBI views have kept changing.
- This leads to several innocent violations.
- The difficulty is compounded by a system with no quick and effective appeal mechanism.
- Some violations are of course due to aggressive interpretation.

Why to consider FEMA

- If amount is quantifiable, penalty can be upto 3 times the amount involved.
- If amount is not quantifiable, penalty can be upto Rs. 2 lakhs.
- Continuing offence – penalty upto Rs. 5,000 per day.
- Property involved in contravention can be confiscated.
- FX holdings may be directed to be brought back, or retained outside India.

  [Sections 13(1) and 13(2)]

- For violations of Indian assets (i.e. by Non-residents), there is no imprisonment (unless penalty is not paid).
- There is no presumption of "mens rea" (guilty mind).

- FEMA violation is NOT a scheduled offence under PMLA.

Consequences of violations can lead to Seizure, Confiscation and Prosecution

- If foreign exchange, foreign security or immovable property, situated outside India – is suspected to have been has been acquired in violation of FEMA, and the officer has reason to believe it, equivalent Indian assets can be seized. [S. 37A)].
- No Compounding is available once S. 37A is applied.
- For the above offence, there can be prosecution upto 5 years and with fine. [S. 13(1B) and 13(1C)].
- Further assets can be confiscated (S. 13(1A).
- These provisions are applicable if the value of assets is in excess of Rs. 1 cr.

Cross-Border Restructuring - Legal Provisions

Key FEMA Principles for Cross-Border Restructuring

- **FEMA acts as the Gatekeeper**
  - Unless enabled under FEMA, any structuring will fail – becomes the first hurdle and not the last check-point to cross
- **FEMA is a Policy Law**
  - And can change overnight without much of a warning. Case in point - investments from Land-bordering Countries - PN3 of 2020
- **Capital Account vs. Current Account.**
  - Capital account transactions are prohibited unless specifically permitted; current account transactions are permitted unless specifically prohibited.
- **Pricing Is Bilateral and Mandatory for Every Transfer**
  - A non-resident seller cannot receive above fair value, and a resident buyer cannot pay above fair value — the pricing obligation applies to both sides of every equity transfer between a resident and a non-resident.

Key FEMA Principles for Cross-Border Restructuring

- **Equity and Debt – all instruments fall in either one bracket**
  - Fully and compulsorily convertible instruments are equity; everything else is debt.
- **FEMA Does Not Operate in Isolation**
  - FEMA allowability, Income-tax impact, Companies Act validity, and Foreign laws permissibility – all act together apart from commercials and objectives
- **Reporting is procedural; but can have a substantive impact**
  - Late or missing FEMA reports (FC-GPR, FC-TRS, Form FC, APR) are independent violations that can block future transactions, and derail deals

Applicability of FEMA

- Regulation is based on:
- **Person:**
  - Whether the person is a Resident or Non-resident
- **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

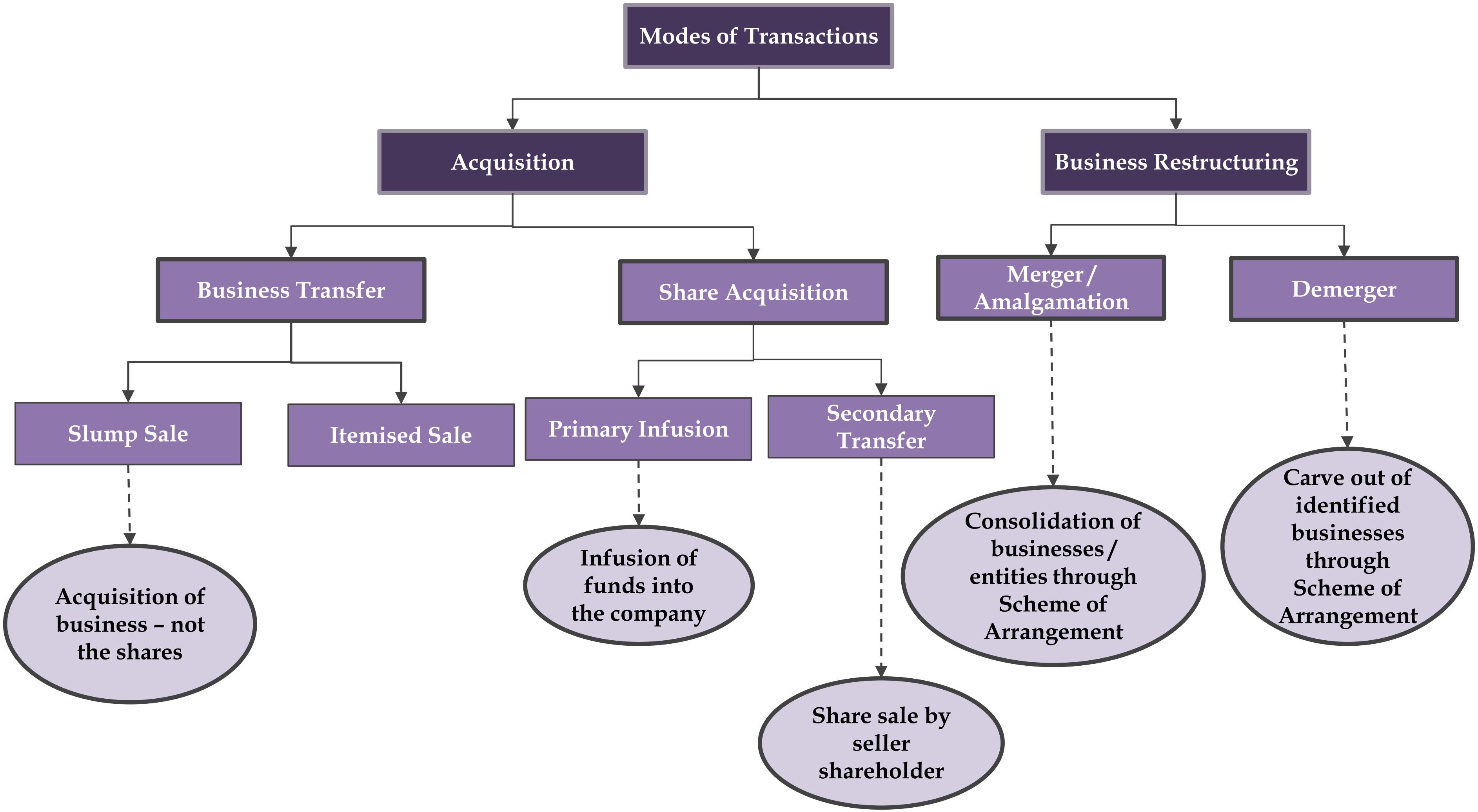
Several Players

Finance Ministry	RBI	DPIIT	CCEA	Ministries	ED
Issue Notifications	Administration, reporting, receipt & payment, compounding	Industrial Policy and Approval	Approvals over specified limits	For specific approvals	Violation, Penalty, Investigation

AD Banks have own set of requirements and monitoring responsibilities

Too many players with each having a different understanding of the law

Major Modes of Structuring Transactions



The Regulatory Architecture — Key Statutes & Rules

FEMA, 1999

Foreign Exchange Management Act, 1999
§6 (Capital Account Txn), §6(3)(b)/(e) (FDI/ODI), §15 (Compounding)

Companies Act, 2013

§230–232 (Mergers), §233 (Fast Track), §234 (Cross-Border)
Governs scheme of arrangement, NCLT/Regional Director approval

NDI Rules, 2019

FEM (Non-Debt Instruments) Rules, 2019
FDI inflows, sectoral caps, pricing, FC-GPR, FC-TRS, share swaps

OI Rules / Regs 2022

FEM (Overseas Investment) Rules & Regs, 2022
ODI, OPI, disinvestment, restructuring of overseas entity, Form FC

FEMA 389/2018

FEM (Cross Border Merger) Regulations, 2018
Inbound/Outbound mergers, deemed RBI approval, 2-year window, Regulation 9

Rule 25A CAA Rules

Companies (Compromises, Arrangements & Amalgamations) Rules
Rule 25A: Cross-border eligibility, notified jurisdictions, RBI approval; Rule 25A(5): Fast-track (2024)

Income-tax Act, Valuation Norms, Accountancy Aspects, etc.

Cross-border Acquisitions

Cross border Acquisitions – Rules Outlay

Cross Border Investments / Acquisitions

Inbound	Foreign Co. acquiring stake in Indian entities	NDI Rules & Regulations apply
Outbound	Indian Co. acquiring stake in overseas entities	OI Rules and Regulations apply
Inbound & Outbound	Cross-Border Swaps	NDI and OI Rules both apply

Inbound Share Acquisition – Routes and instruments

Possible Inbound Routes under FEMA

FDI

- Company – Equity shares / CCPS / CCDs / Warrants
- Capital Contribution in LLP
- Public market > 10%
- Convertible Notes in start-ups.

- Alternate Investment Fund (AIF)
- Real Estate Investment Trust (REIT)
- Infrastructure Investment Trust (InvIT)

FPI

- Listed Equity < 10%
- Security Receipts (SR)
- Listed NCDs
- Unlisted NCDs
- Equity oriented mutual funds
- G-Sec, etc

FVCI

- Equity shares
- CCPS / OCRPS / NCPS
- CCDs / OCDs / NCDs
- Warrants

Others

- NRIs – portfolio and others
- Depository Receipts

FDI in Cross-Border Restructuring

Entry Routes

- Automatic Route: No prior govt. approval needed
- Government Route: Prior approval from competent authority (DPIIT/Sectoral Ministry)
- Prohibited sectors: Lottery, gambling, chit funds, Nidhi companies
- Sensitive sectors (Defence, Media, Pharma): Special conditions apply

Pricing Guidelines

- NR acquiring Indian shares: price ≥ fair value (SEBI method for listed; DCF/NAV for unlisted)
- NR selling Indian shares: price ≤ fair value
- Valuation by CA / Merchant Banker (SEBI registered)
- Arm's Length Price — internationally accepted methodology

Key Reporting

- FC-GPR: Filed within 30 days of allotment to NR on FIRMS portal
- FC-TRS: Filed within 60 days of transfer of shares between resident and NR
- KYC required; AD Bank certification mandatory
- Late filing attracts compounding (administrative action prerequisite)

NDI Rules Amendment: NRs can now acquire Indian company shares by swapping shares of a foreign company — a major liberalisation for M&A and reverse flips - Covered in detail in later slides.

Overseas Direct Investment Routes

Routes for ODI by Indian Party

- **Automatic Route** → Intimation to RBI through Authorized Dealer Bank
- **Approval Route** → Prior approval from RBI

OI prohibited in following activities / countries–

- Banking Business
- Real Estate business*
- Non-co-operative countries and territories identified by Financial Action Task Force (FATF) or as notified by RBI in this regards

Entity-wise specific provisions:
Indian Parties (i.e., Companies, registered partnership firms, LLPs and statutory bodies)

- Registered trusts, societies
- Mutual Funds
- Individuals / proprietorships

OI in financial services activities is subject to conditions

ODI in Cross-Border Restructuring

OLD FRAMEWORK (pre-2022)

FEMA 19 / ODI Rules 2004
Complex, restrictive; 400% net worth cap maintained; limited restructuring flexibility; ODI in financial sector abroad required RBI approval

NEW FRAMEWORK (Aug 2022)

OI Rules + OI Regs + OI Directions 2022
Unified ODI/OPI distinction; defined concepts of 'financial commitment'; restructuring explicitly addressed in Rules 17, 18

FORM FC

Unified reporting form on FIRMS portal. Covers all financial commitments, restructuring events, and disinvestments.

Rule 17(2)

Transfer of ODI to another Indian resident (eligible) or NR — Arm's Length pricing required; AD Bank to ensure compliance

Rule 17(3)

Transfer on account of merger, demerger, amalgamation — requires competent authority approval (NCLT / foreign court) as per applicable laws

Rule 17(4)

1-year lock-in for ODI disinvestment; EXCEPTION: intra-group merger/demerger with no dilution in aggregate equity holding

Rule 18

Restructuring of balance sheet of a loss-making overseas entity (losses in preceding 2 years) — permitted subject to prescribed conditions

§400% Net Worth

Financial commitment by Indian party cannot exceed 400% of net worth as per last audited balance sheet (automatic route)

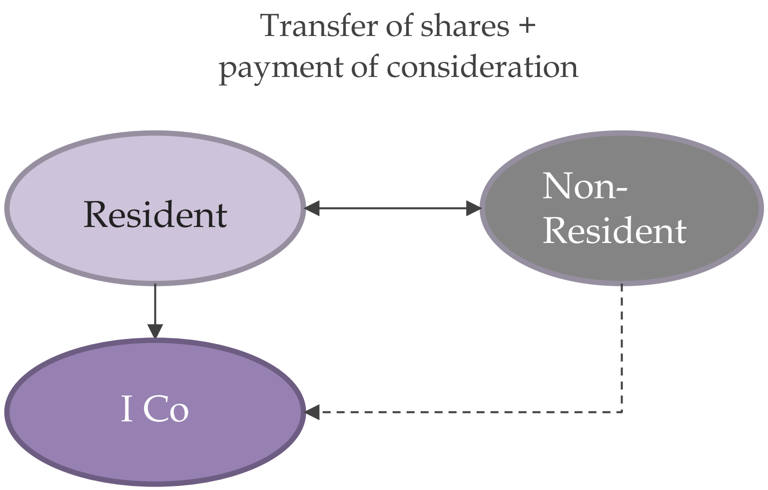
APR (Annual)

Annual Performance Report (Form ODI-APR) mandatorily filed by July 31 each year for all ODI entities

Cross border Acquisition – Valuation overlaps

Regulation	Methodology	Valuer
Companies Act, 2013	**Listed Co.** – SEBI **Unlisted Co**. – method to the best judgment of valuer	**Listed** - MB **Unlisted** - RV
FEMA - Inbound	**NDI Rules:** **Listed Co**. – SEBI **Unlisted Co.** – Internationally accepted pricing methodology	**Listed** – MB **Unlisted** – CA or MB or Cost Accountant
FEMA - Outbound	**OI Rules:** Arm's length pricing taking Valuation as per internationally accepted pricing	OI Rules silent
Under Income-tax Act	Rule 11UA basis audited financials as on date of transaction	Report not mandated

Inbound Share Acquisition through Deferred Consideration

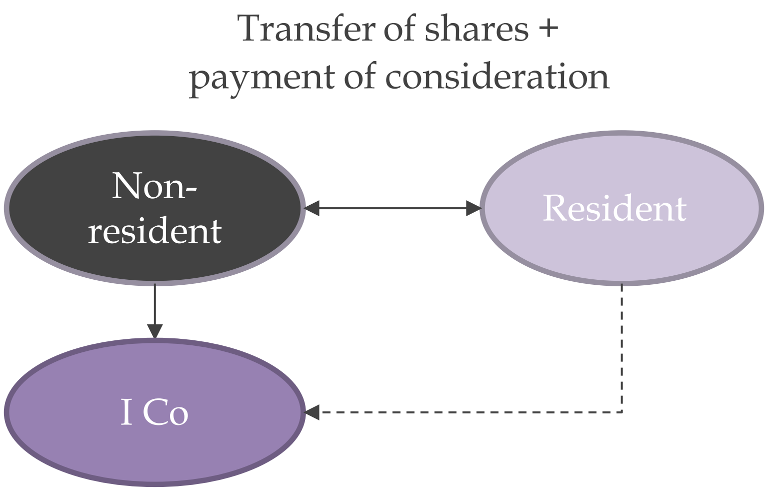


Deferred consideration permitted up to 25% of the total consideration. This may be -

- Paid within 18 months of the date of transfer agreement; OR
- Indemnification <= 18 months from the date of the payment of the full consideration; OR
- May be settled through an escrow arrangement between the buyer and the seller for a period < = 18 months (agreement date)
- In all of the above cases, total consideration to be in compliance with the pricing guidelines

Contingent Consideration	Debatable
Applicability in case of transaction involving FOCC as Buyer / Seller	**Condition same as direct FDI – Master Direction amended in January 2025**

Outbound Share Acquisition through Deferred Consideration



Deferred consideration permitted

- Deferral for definite period as per the agreement
- Upfront transfer of foreign securities
- Full consideration to be within the pricing guidelines
- Deferred amount to be considered as non-fund-based commitment

Contingent Consideration	May be permitted subject to upper cap
Resident to Resident transfer	**Not permitted**

Earn-out v/s Deferred consideration v/s Deferred sale

Earn-out

- **FEMA**
  - Capital account or current account?
- **Income tax**
  - Capital gains or Salary?
  - Taxable in the year of accrual (Cash flow impact for sellers) or in the year of receipt?
- **Accounting**
  - P&L charge for the buyer?

Deferred consideration

- **FEMA**
  - Permissible subject to deferral upto 25% of consideration upto 18months (automatic route)
- **Income tax**
  - Capital gains or Salary?
  - Taxable in the year of accrual (Cash flow impact for sellers)
- **Accounting**
  - Acquisition and corresponding liability (including deferred consideration)

Deferred Sale

- **FEMA**
  - Permissible
- **Income tax**
  - Capital gains
  - Valuation and compliance for each tranche of sale
- **Accounting**
  - Acquisition and corresponding liability (including deferred sale stake)

Hybrid Instruments

- Equity
- Compulsorily Convertible Debenture
- Compulsorily Convertible Preference Shares

- All other instruments are considered as Debt

Foreign Direct Investment

NDI Rules, 2019 applicable

ECB guidelines

Significant Liberalisation with acquisition financing

Overseas Direct Investment

OI Rules and Regulations

Considered Debt and counted in FC

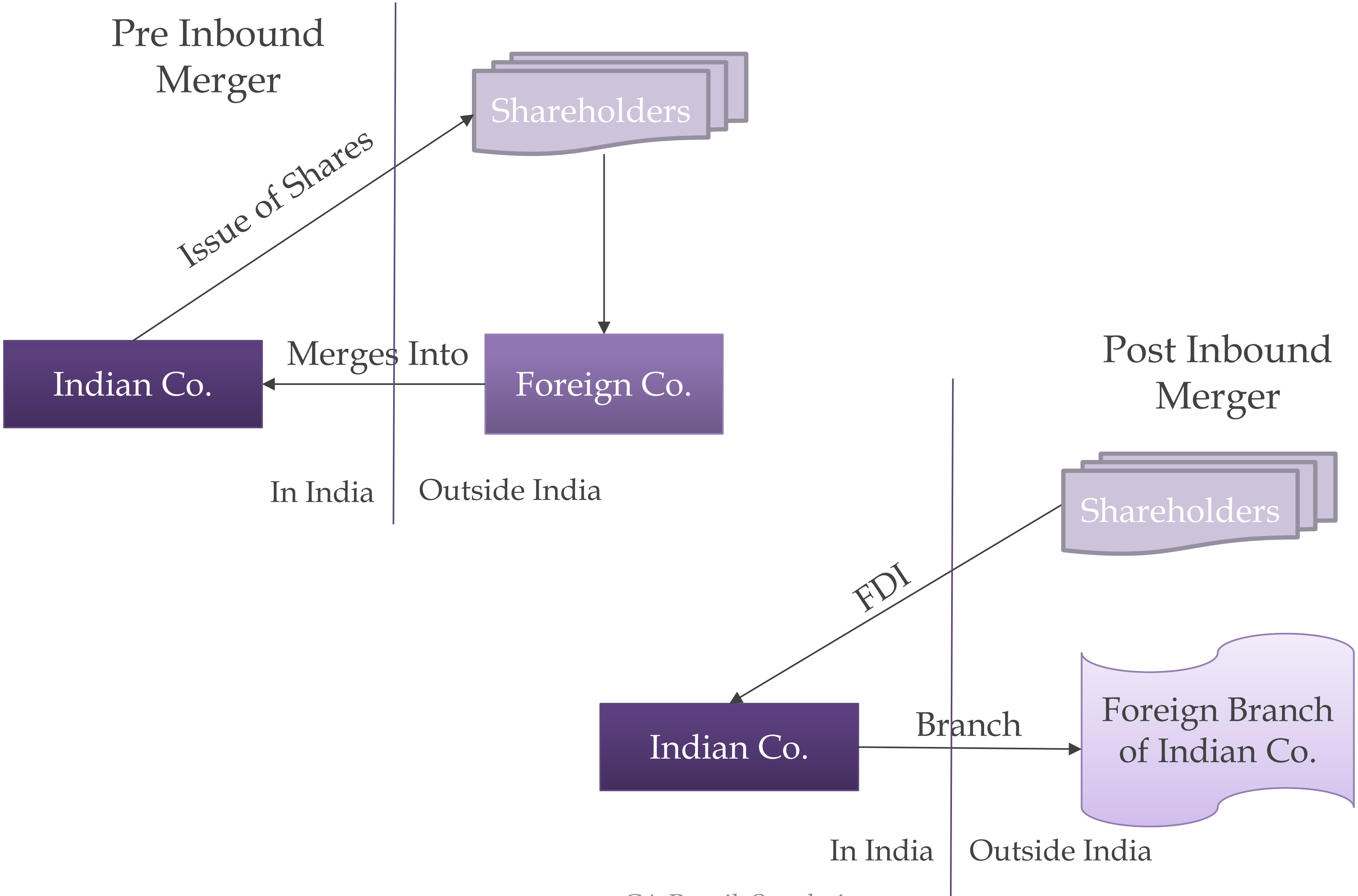
Debt permitted only if equity with control

Cross-border Mergers

Cross Border Merger Regulations

- RBI has notified the Foreign Exchange Management (Cross Border Merger) Regulations on 20 March 2018 (“Cross Border Regulations”)
- Cross Border Regulations define cross border merger to mean any merger, amalgamation and arrangement between an Indian company and foreign company in accordance with Companies (Compromises, Arrangement and Amalgamation) Rules, 2016 (“Companies Rules”) notified under the Companies Act, 2013
- Valuation of the companies involved shall be done in accordance with Rule 25A of the Companies Rules
- All transactions of cross border merger shall have deemed approval of RBI as required under the Companies Rules if it is in accordance with Cross Border Regulations
- Certificate from Managing Director / Company Secretary ensuring compliance to Cross Border Regulations to be furnished alongwith application to NCLT.
- Outbound mergers are permissible for foreign companies located in Jurisdictions which satisfies conditions as per Annexure B to Rule 25A (2) (a)

Inbound Merger – Foreign Co. into India Co.



Inbound Merger – Foreign Co. into India Co.

1. Foreign Direct Investment

- Pricing guidelines, entry routes, sectoral caps, attendant conditions, reporting requirements, etc. to apply in case shares are issued to PROI

2. Overseas Direct Investment

- I Co to comply with disinvestment provisions

  - Write-off on disinvestments on merger of foreign WOS/JV?

- Where F Co has investments in step down subsidiaries compliance with the ODI regulations

3. Assets held outside India

- Immovable property of F Co can be held by I Co if permissible under FEMA
- If not permissible, to be sold within 2 years
- Proceeds to be utilised for payment of overseas liability not permitted to be held under FEMA within a period of 2 years

4. For liabilities ECB conditions to be complied with

5. Compliance with FEMA 10R for overseas bank account

Other considerations: Exemption u/s. 47 of the ITA; Essential to understand any approval required under local jurisdiction (example Singapore)

Cross-Border Swaps

Swap of shares under FEMA – a timeline

From	Document	Swap permitted	Remarks
19th 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.
15th February 2016	FEMA 20	FDI-FDI (Primary swap)	Indian entities permitted to "issue" shares to non-residents against **swap of shares of Indian company.**
16th August 2024	Amendment in NDI Rules	FDI-FDI (Secondary swap) & ODI-FDI	NRs permitted to acquire shares of Indian company by way of **swap of shares of foreign company.**
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

- 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 has become one of the popular manners for corporate restructuring, especially for startups

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

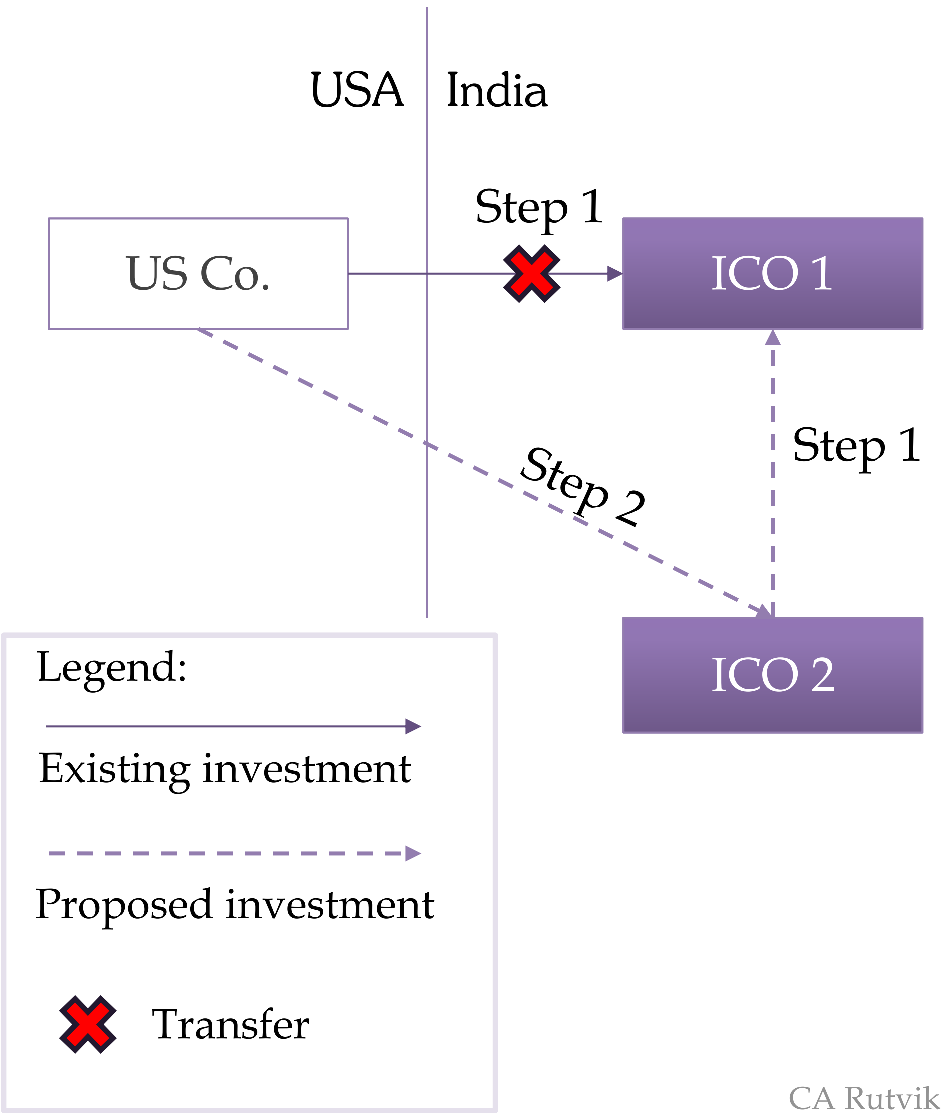
- Swap may not be preferred due to tax considerations
- But preferable where cash flow considerations are paramount

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 **<u>may issue</u>**… 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 **<u>by an Indian company.</u>**

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



- 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.

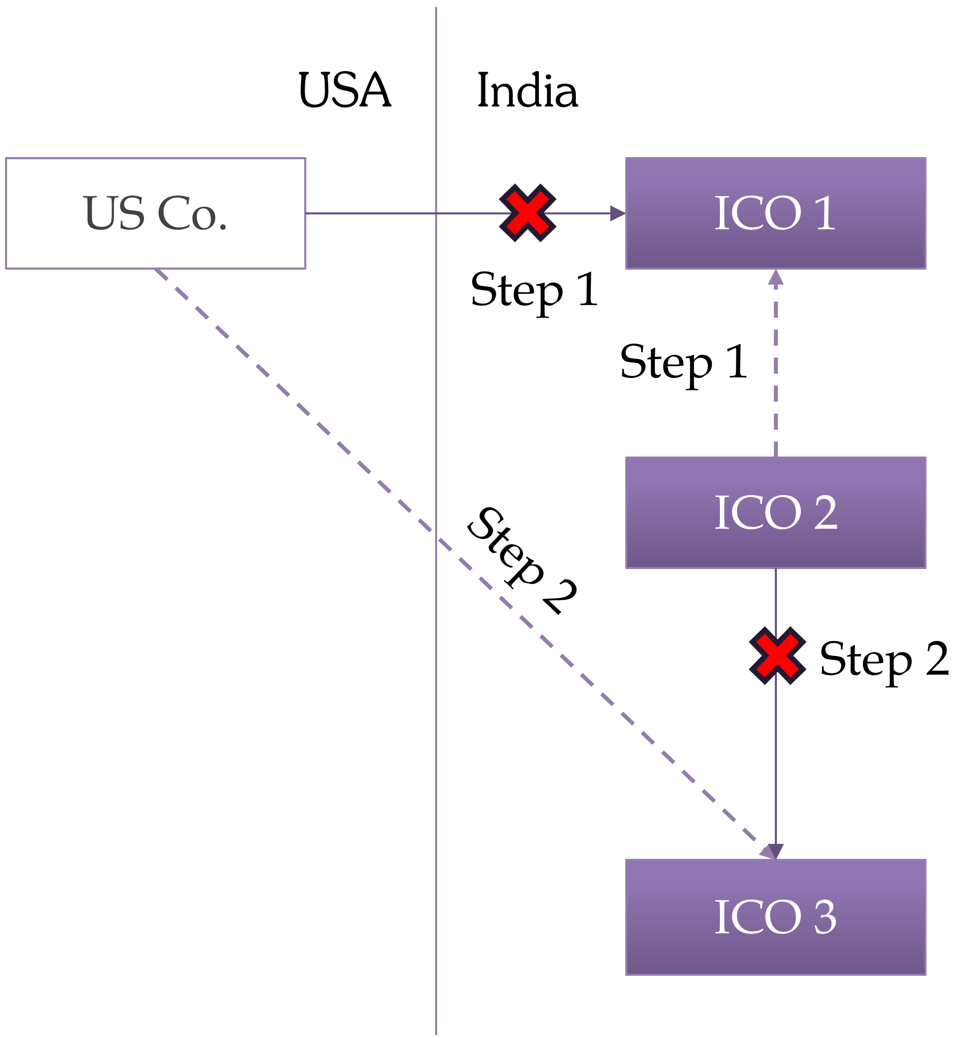
Analysis of Swap 1: ICO issuing shares to US Co for another ICO's shares

- 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.

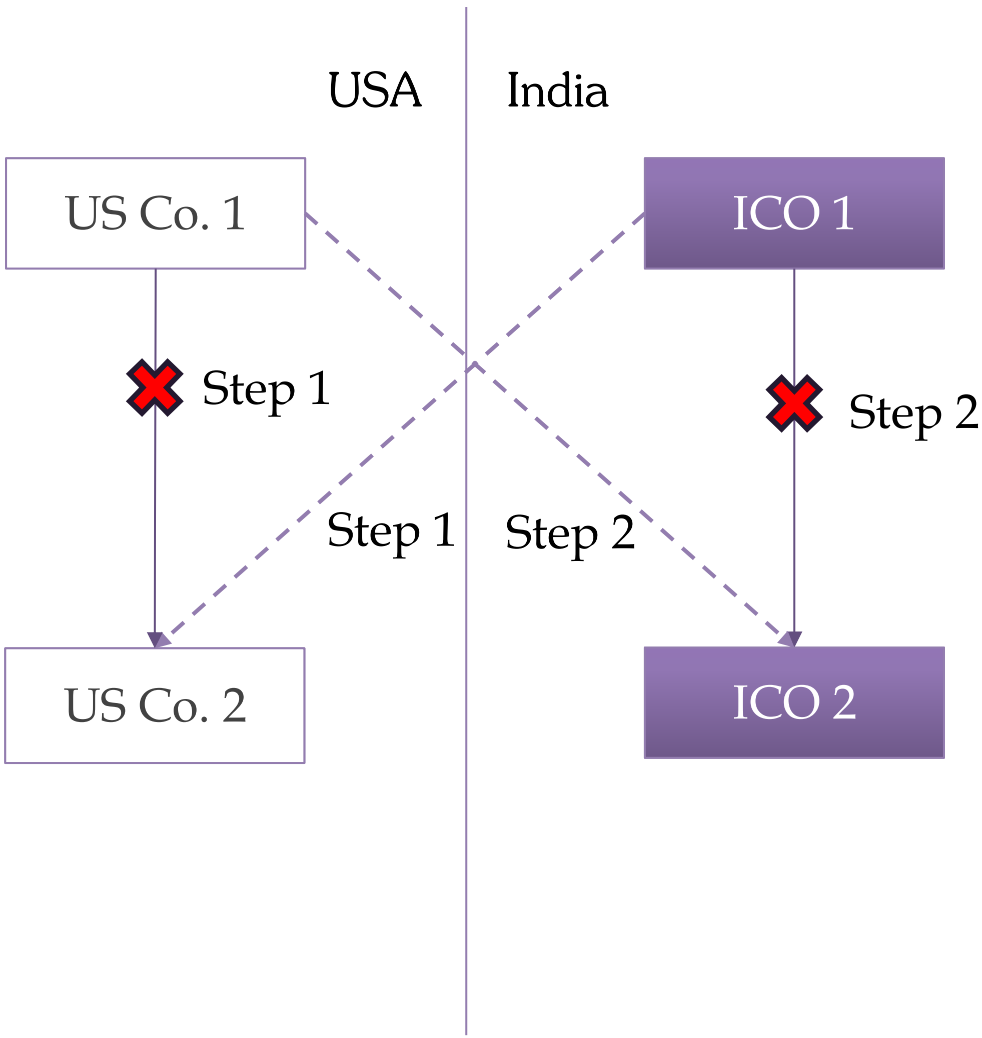
- Similar position can be found in reporting provisions and in Master Directions

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………;
- **<u>(v) the swap of securities;</u>**
- (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;
- **<u>(iii) by swap of securities;</u>**
- (iv) by using the proceeds of American Depository Receipts or Global Depositary 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 **<u>which are not equity instruments</u>**
  - As shares of US Co. 2 are not issued **by an Indian company**

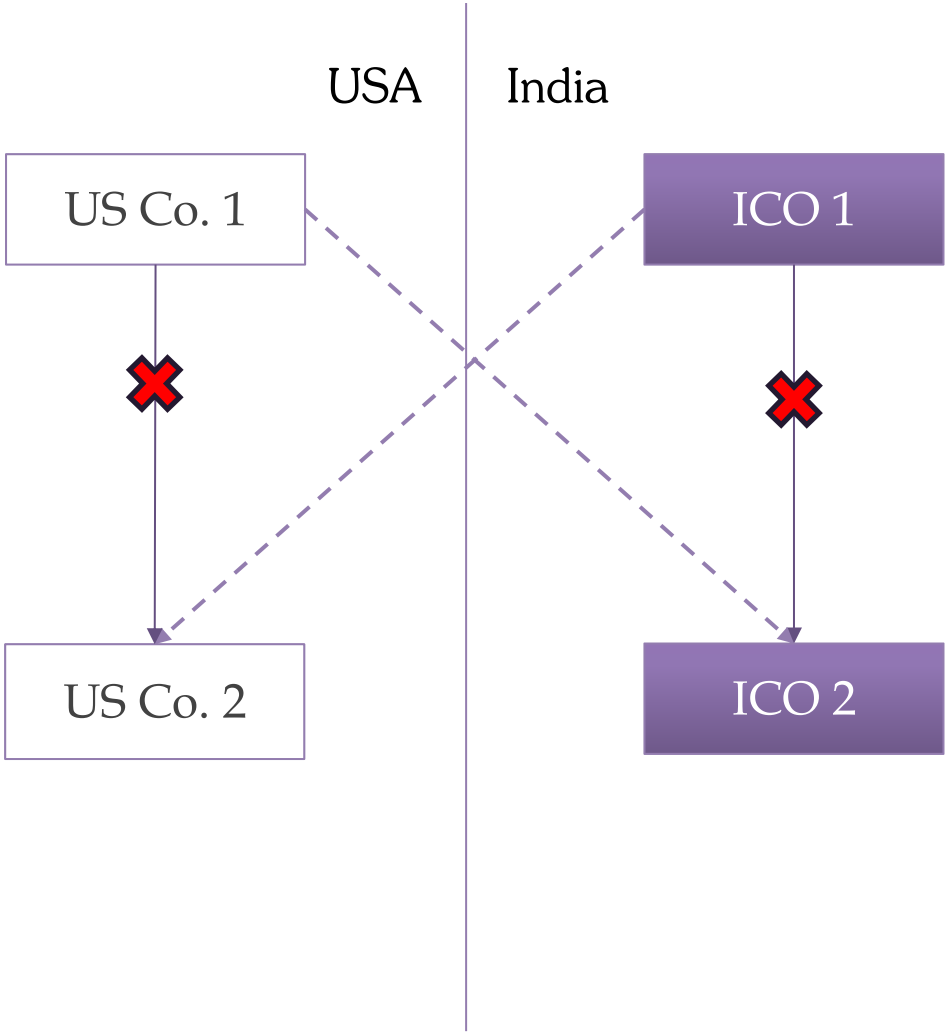
- Hence, was not a permitted manner to make FDI as per NDI Rules
- FDI leg required prior approval
- Non-starter for effective cross-border swaps
- Many startups which wanted to externalise were hit by this restriction

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

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

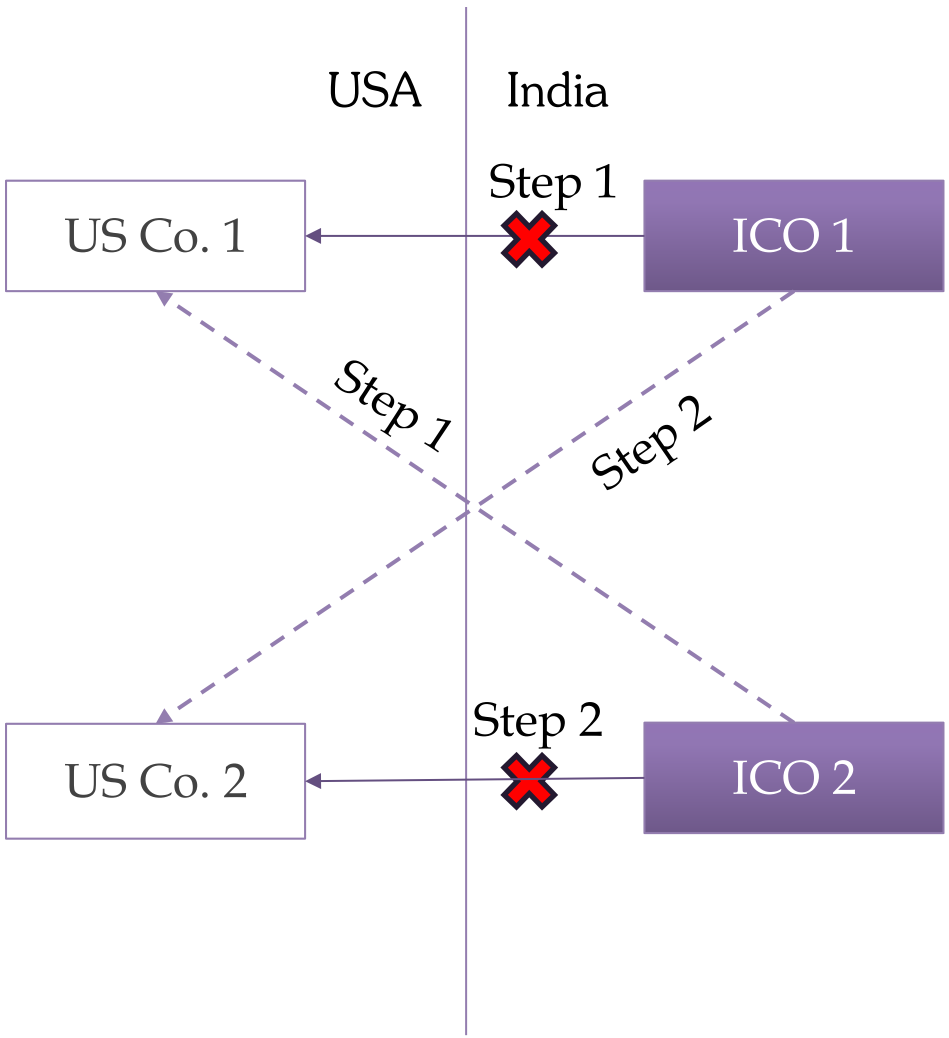
- “**9A. Swap of equity instruments and equity capital.** — The **transfer** of equity instruments of an Indian company between a person resident in India and a person resident outside India may be by way of—
- (i) swap of equity instruments, in compliance with the rules prescribed by the Central Government 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

Issue of 'transfer' under OI Rules
Swap 4: 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 **<u>by way of sale</u>** 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 **<u>merger, amalgamation or demerger or on account of buyback of foreign securities</u>**, such transfer or liquidation in case of liquidation of the foreign entity, shall have the **<u>approval of the competent authority</u>** 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 4

- **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??

What is not possible

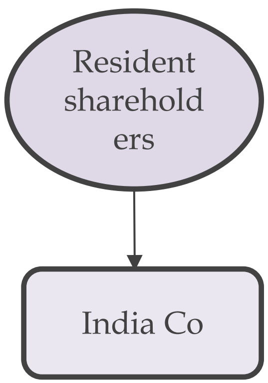
- **Cross-border swaps are not possible for:**
- **ODI by Resident Individuals:** Resident individuals can acquire foreign securities by way of swap – only in case merger, demerger, amalgamation or liquidation

- **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

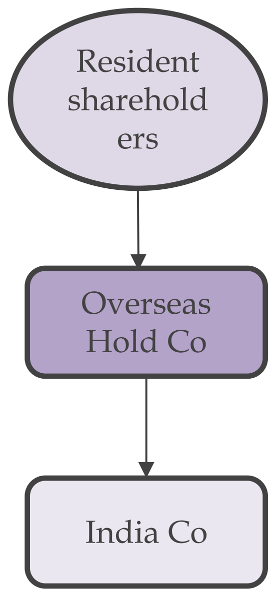
Externalisation

Externalisation

Pre-externalisation structure



Post externalisation structure



What is externalization / flip structure?

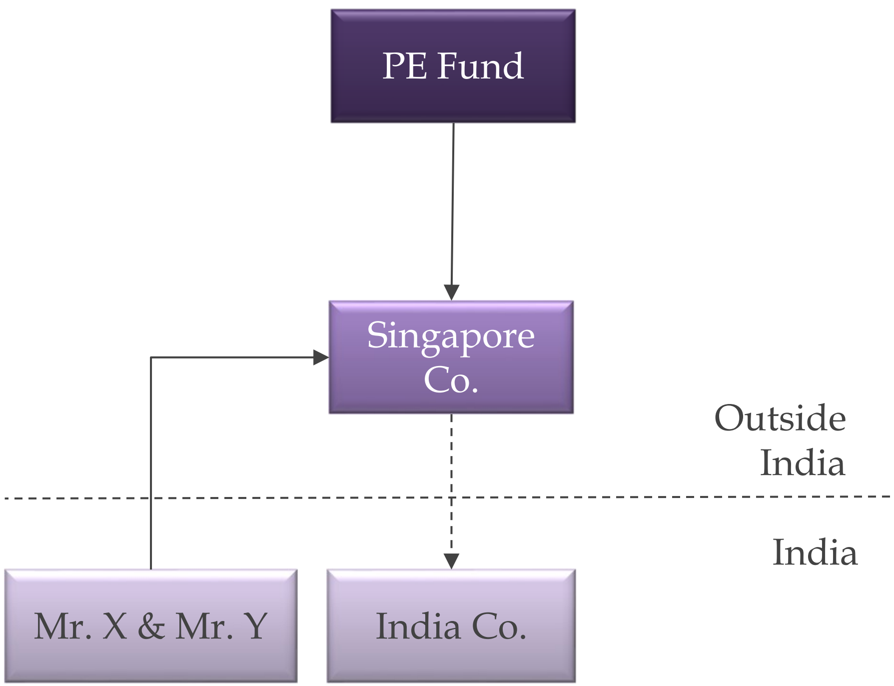
- Migration and mirroring of cap table from existing Indian company to the Overseas Holding Company ('OHC');

  and

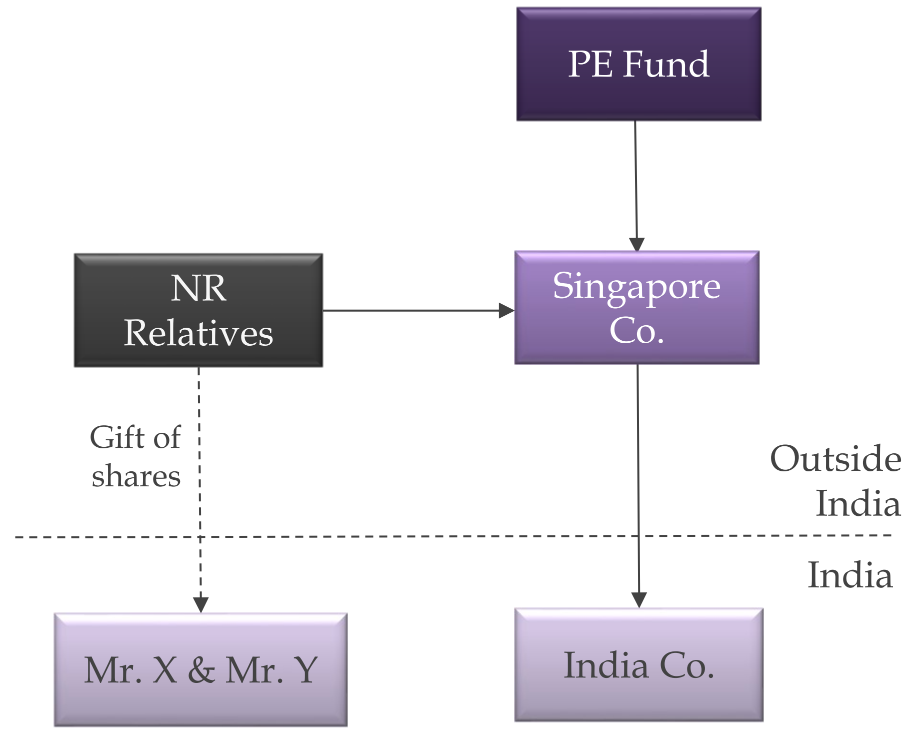
- Subsequent realignment / consolidation of India business under the OHC structure

Externalisation

Structure using NR Fund

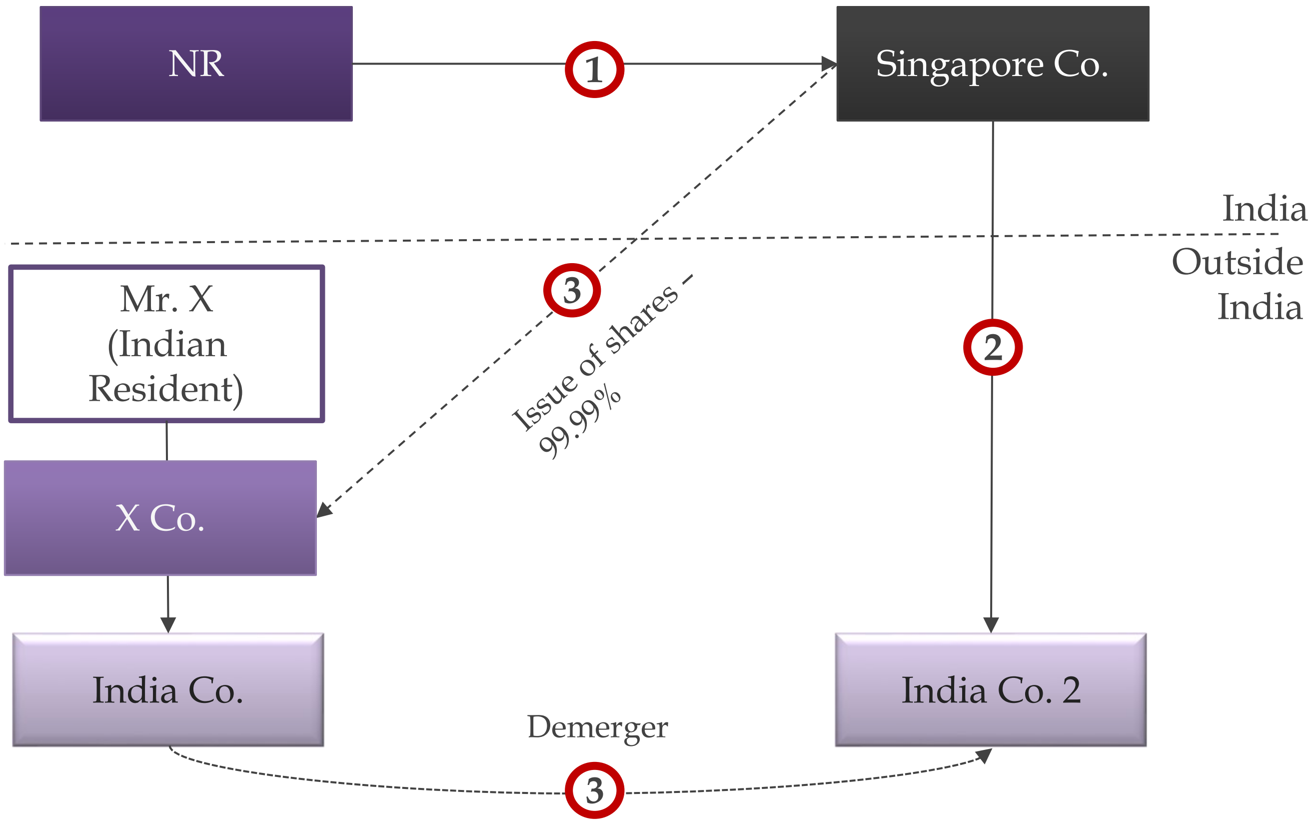


Structure using gift from NRIs



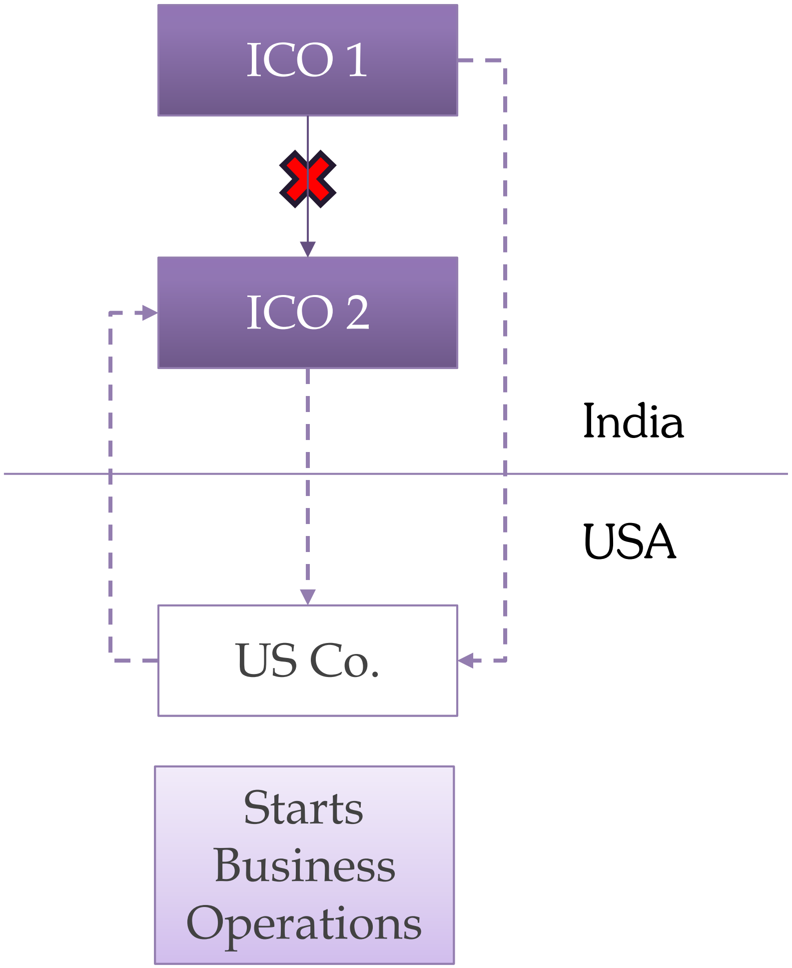
Prevalent under earlier FEMA 120 – would lead to FEMA violations requiring regularisation and compounding for round-tripped structure and sham gifts. Round-tripped structures now allowed for entities under OI Rules.

Externalisation by way of Demerger



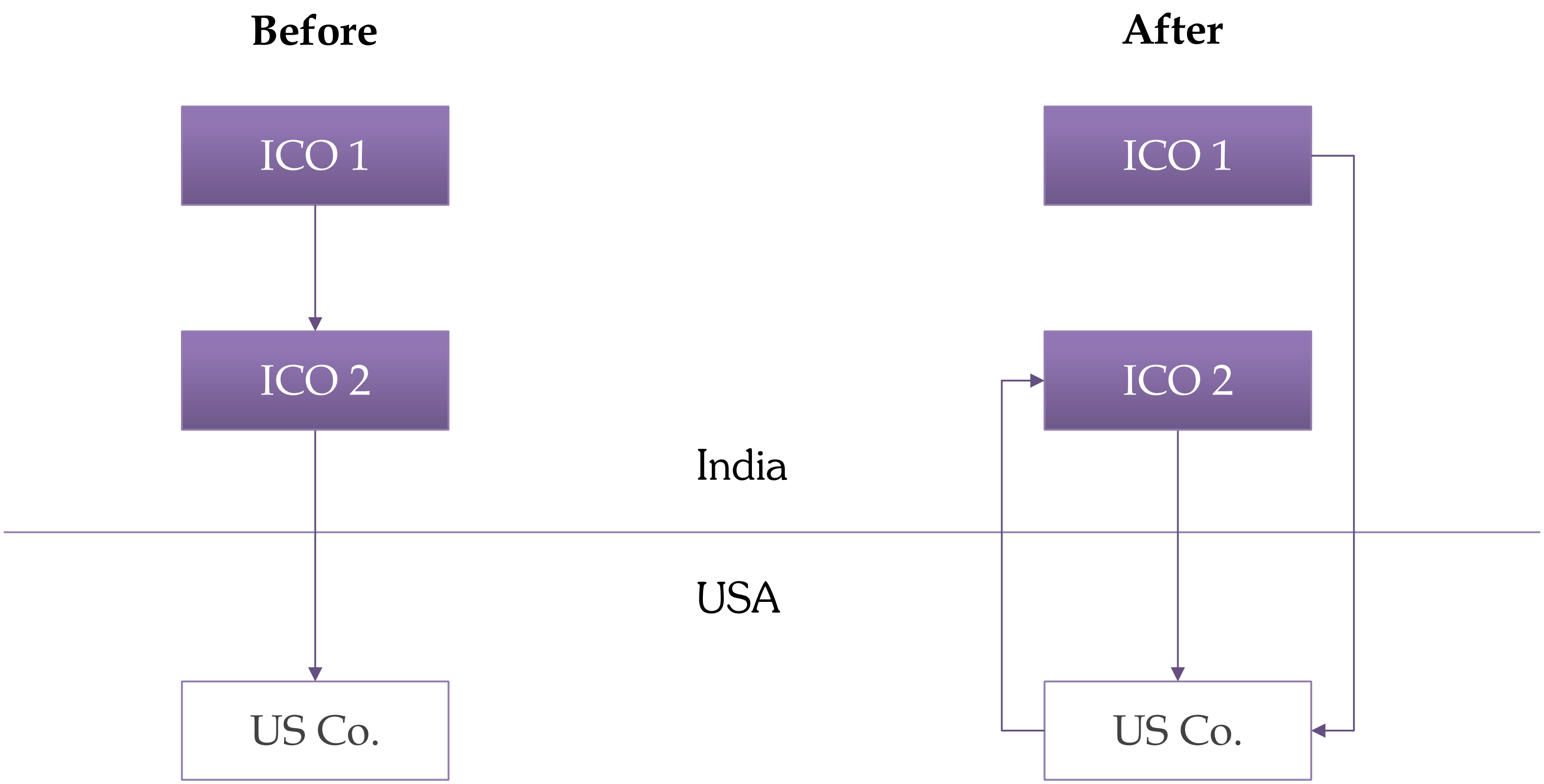
- Round trip structure now permitted under FEMA
- Exemption under Section 47 of Income-tax Act, 1961

Externalisation through Swap



- ICO 1 wants to flip its holding company structure such the 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.

Externalisation through Swap



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

Reverse Flip or Internalisation

The Journey of Indian Startups

- Ghar-wapsi – but with conditions!

Start-up ready for Funding
- Indian entities with negligible overseas presence

→

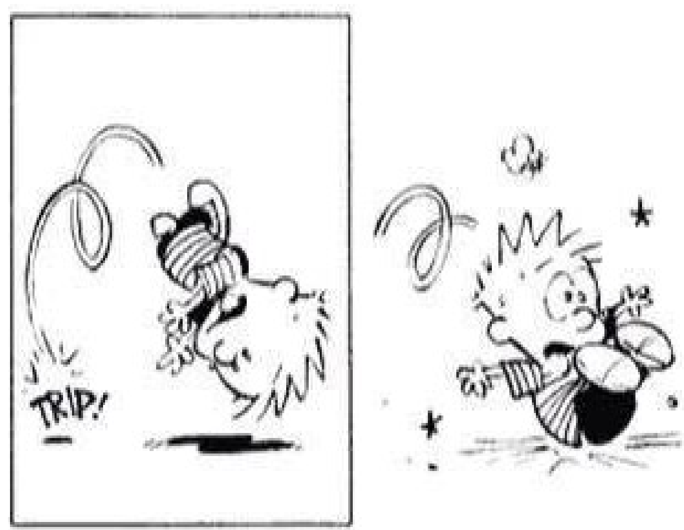
Externalisation
- Mandated by PE Fund for eventual exit

→

Large valuations in Indian Market
- What to do now?

→

Reverse-flip
- Internalisation – back to where they were

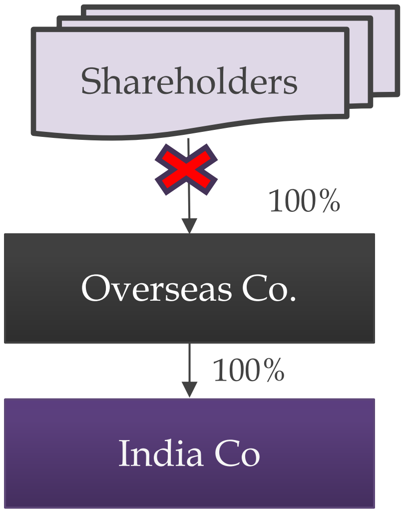


Reverse Flip – Internalisation

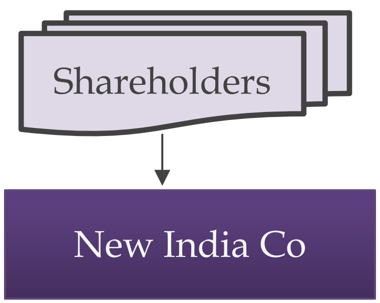
Phone Pay	Share swap with Singapore company
Pine Labs	Inbound merger of Singapore holding company - NCLT
Zepto	Inbound merger of Singapore holding company - NCLT
Dream 11	Inbound merger of Delaware (USA) holding company – fast track merger
Razor Pay	Inbound merger of Delaware (USA) holding company – fast track merger

Option 1 – Liquidation of Overseas Co.

Existing Structure



Resultant Structure



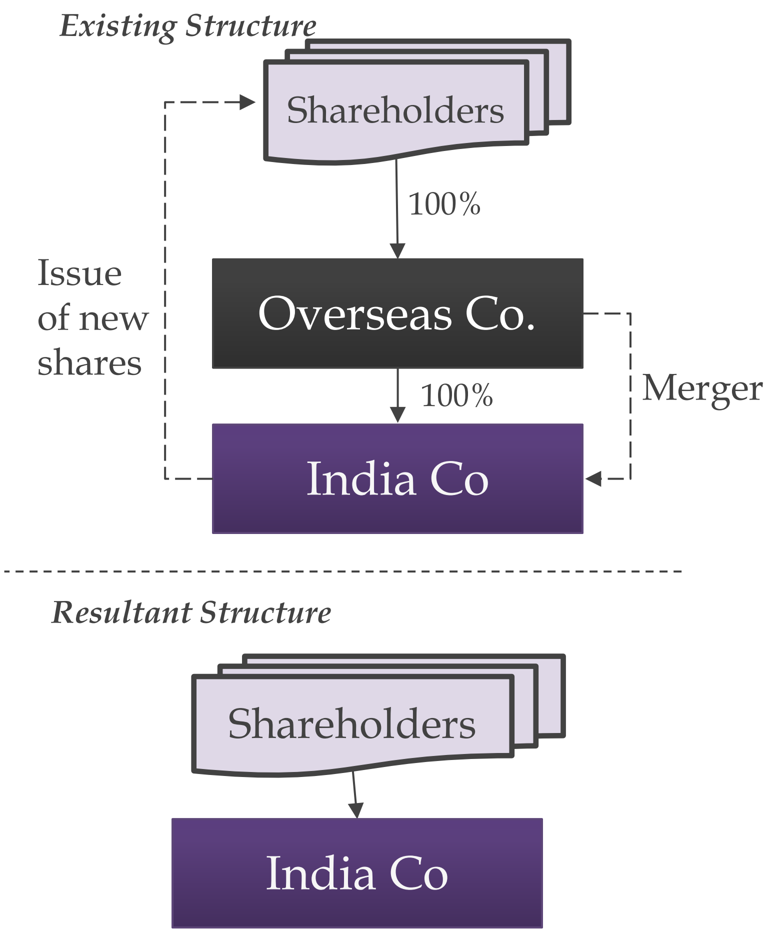
Step 1: Overseas Co. to transfer assets to India Co. and then undertake voluntary liquidation in compliance with the laws of overseas jurisdiction

Step 2: Overseas Co. to distribute its assets and liabilities (being shares of India Co) to its existing shareholders

Not possible for individual shareholders as step-down subsidiaries are not allowed for individuals. Possible for non-individual shareholders.

Essential to evaluate tax implications in overseas jurisdiction and in India and costs of liquidation in overseas jurisdiction

Option 2 – Inbound merger of Overseas Co.



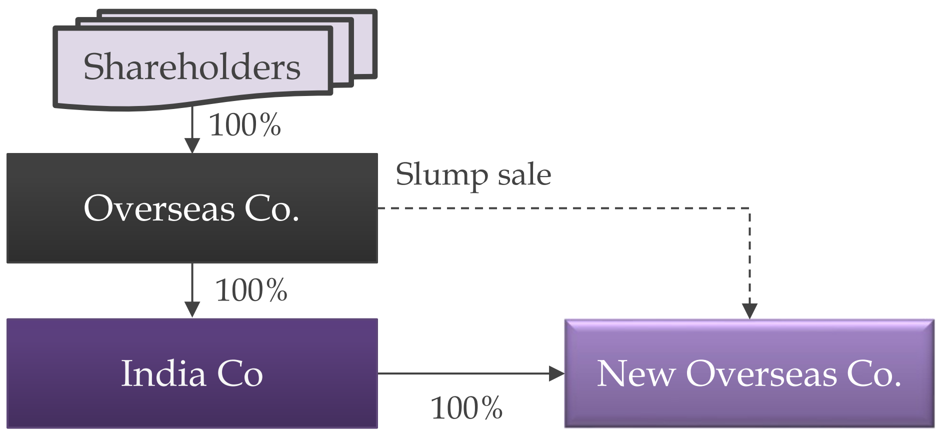
Step 1: Merger of Overseas Co. into India Co under fast-track route / NCLT route

Step 2: Issue of shares by India Co to the shareholders of Overseas Co. as consideration for merger

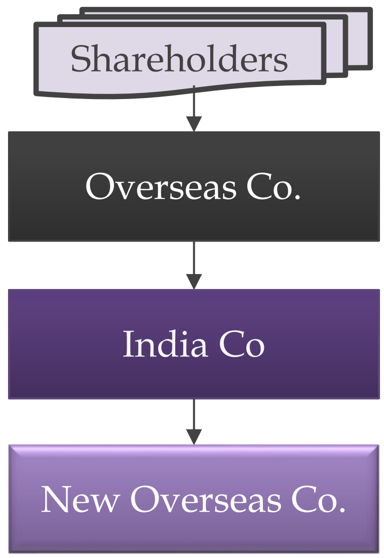
Inbound merger is tax neutral in India – brought forward tax losses of India Co may lapse on merger

Option 3a – Business transfer

Existing Structure



Resultant Structure



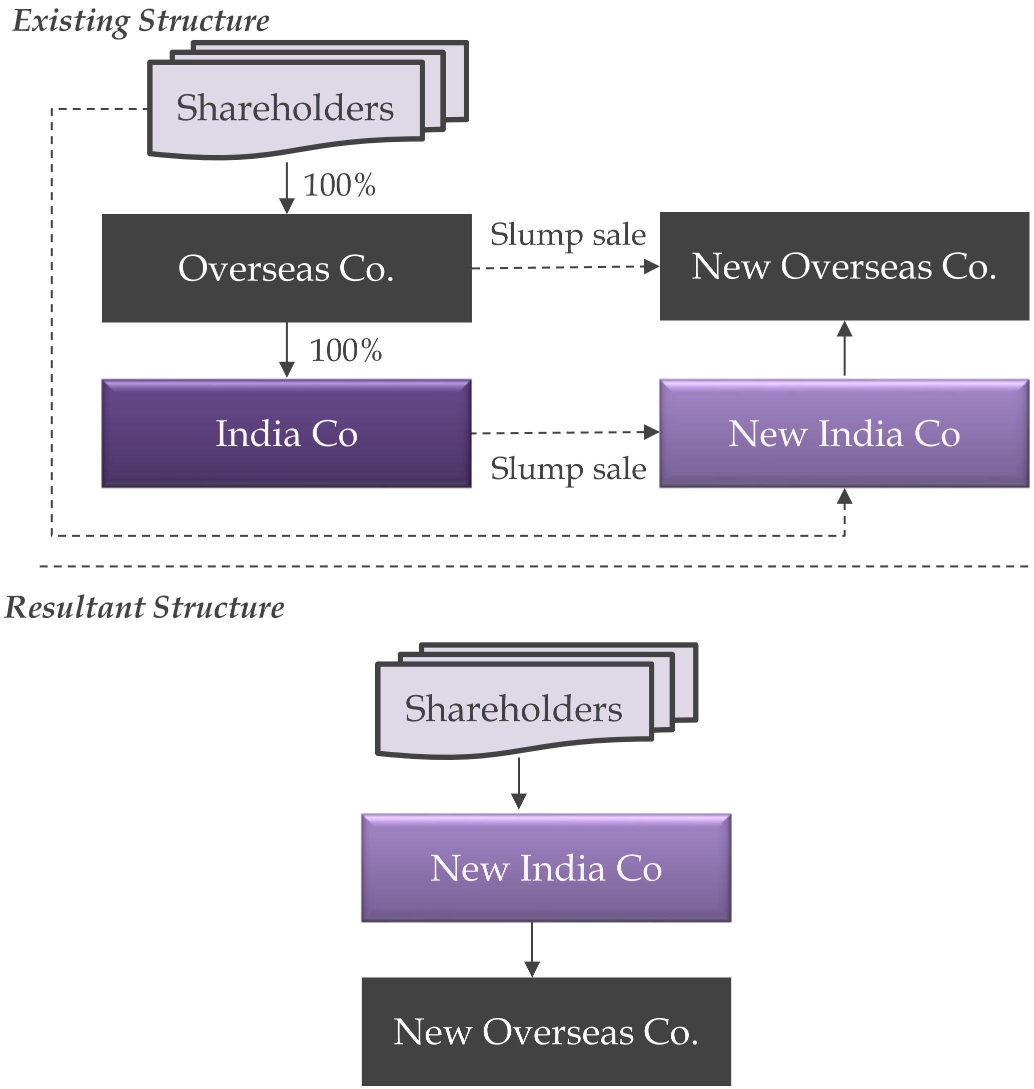
Step 1: India Co. to set-up a new Overseas Co.

Step 2: Overseas Co. to transfer business (assets and liabilities including employees and contracts) to New Overseas Co. through slump sale.

Suitable if Overseas Co. is asset light or for jurisdictions where business transfer does not result in major tax consequences.

Can consider follow-on merger of Overseas Co. into India Co.

Option 3b – Business transfer

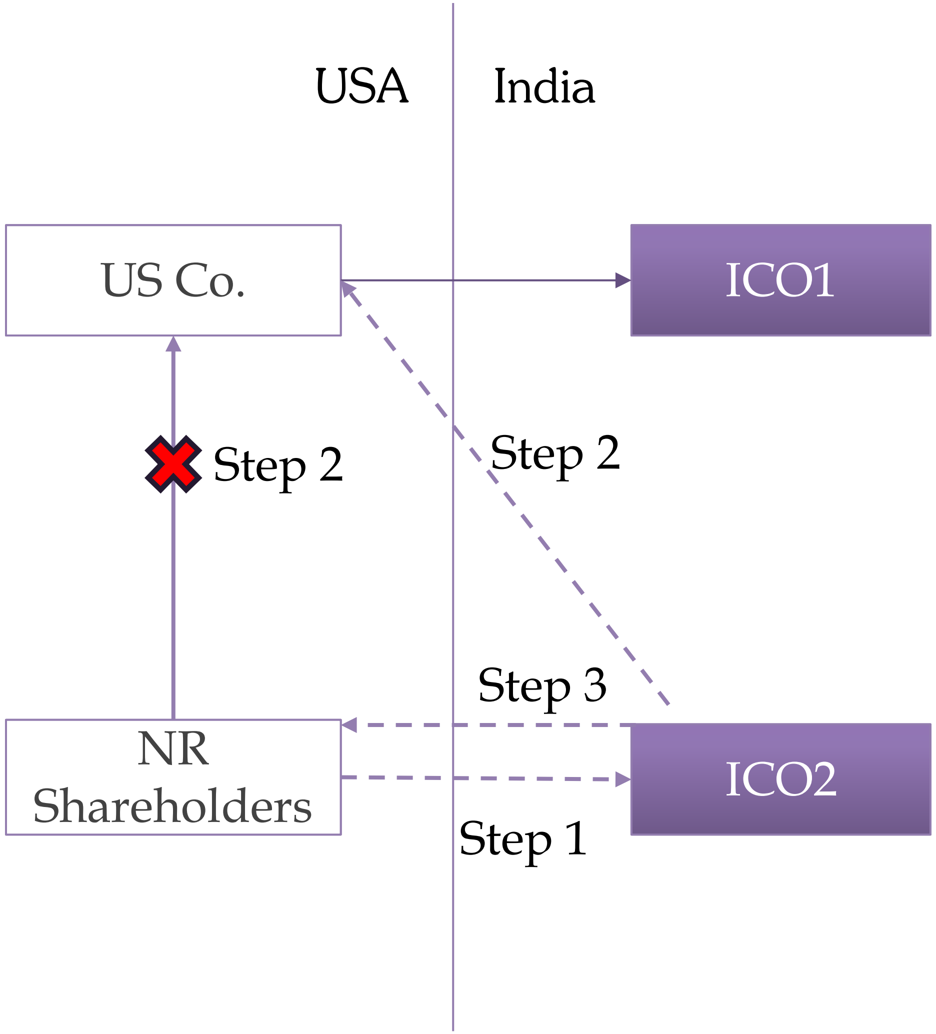


Step 1: Shareholders of Overseas Co. to set up a New India Co with mirror shareholding and New India Co to set up a New Overseas Co.

Step 2: India Co and Overseas Co. to transfer business (assets and liabilities including employees and contracts) to New India Co. and New Overseas Co. respectively through slump sale

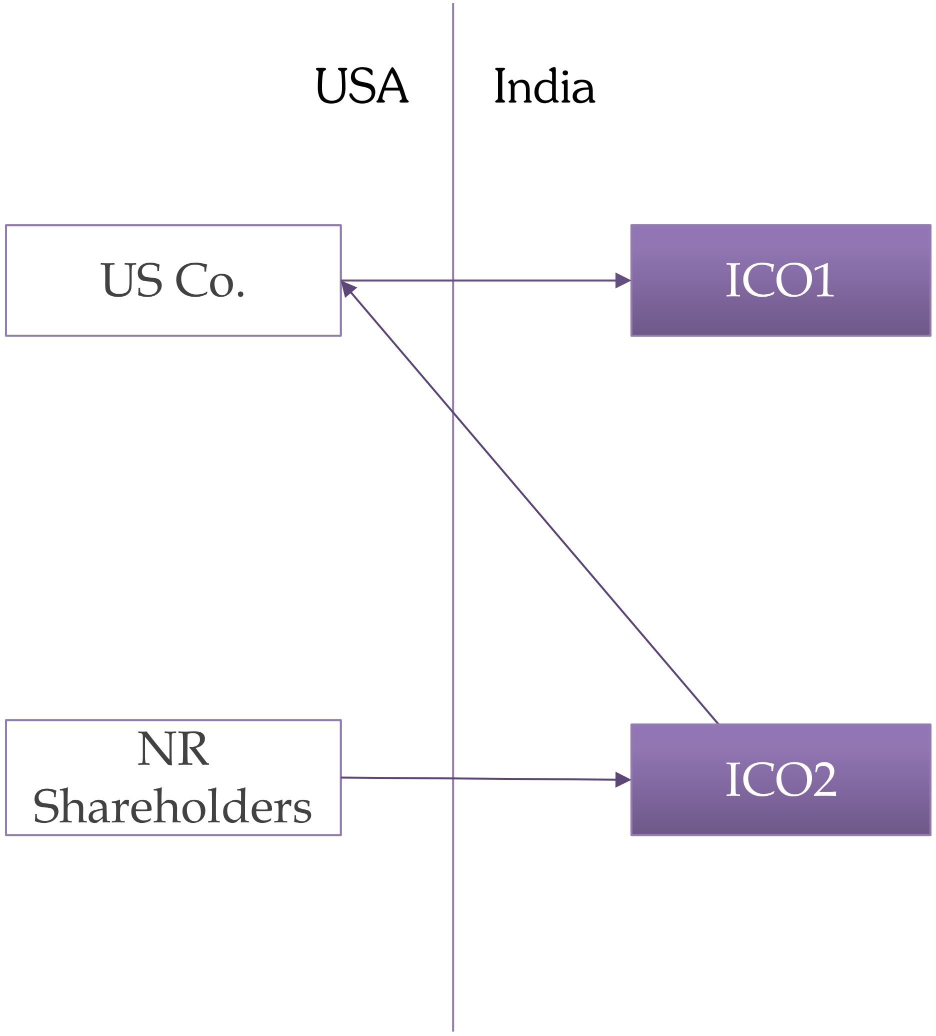
Step 3: Overseas Co. and India Co to be liquidated

Option 4: Reverse-Flipping through Swap



- 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

Reverse-Flipping through Swap



- 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

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!

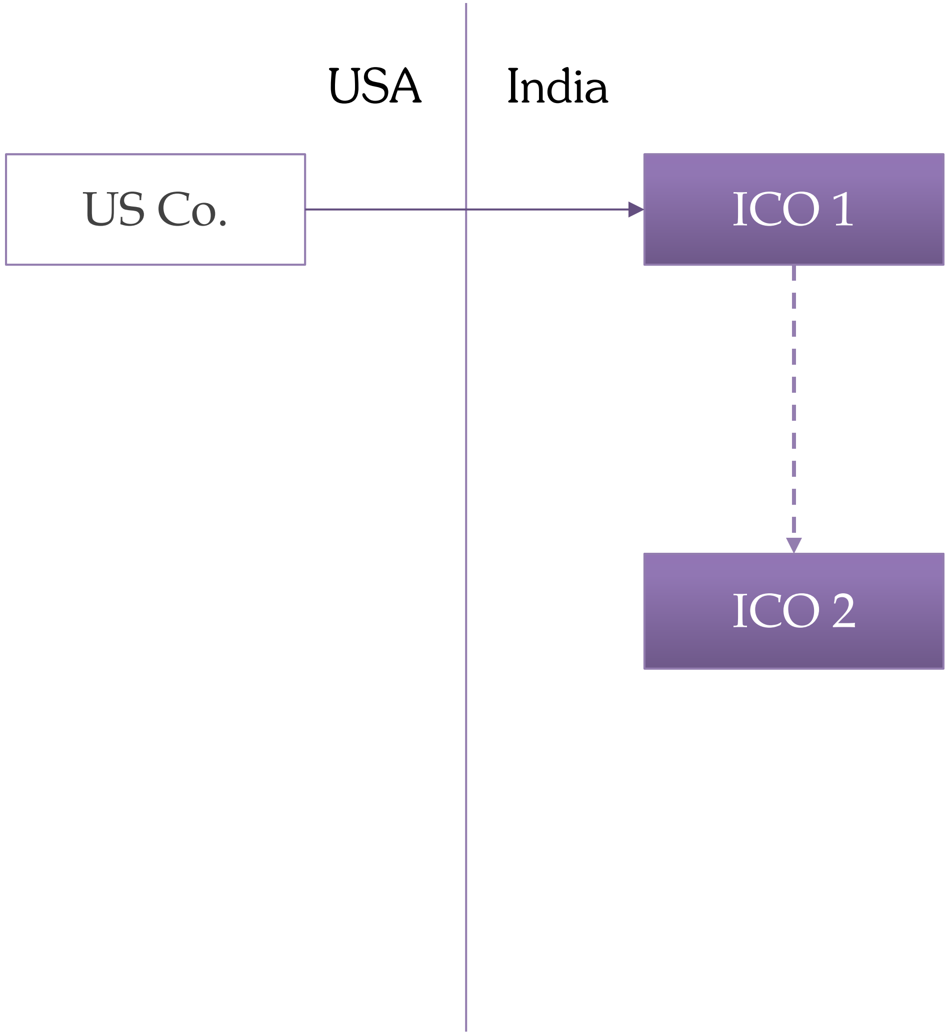
Reliefs extended to FOCCs vide clarification dated 20th January 2025

- FOCCs are technically Persons Resident In India
- But are considered as Persons Resident Outside India when it comes to investment
  - But still for reporting purposes are considered as Resident!

- 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



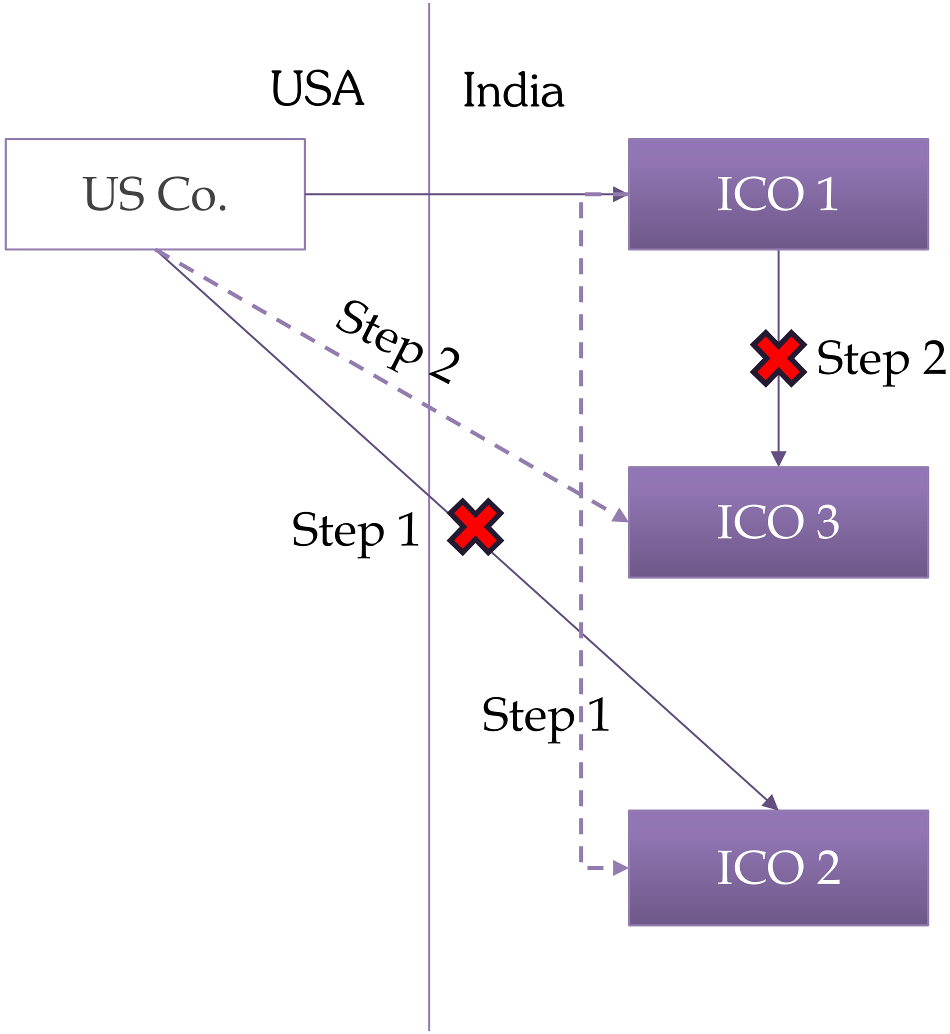
- US Co. holds shares of ICO 1, which is an FOCC.
- ICO 1 wants to purchase the shares of ICO 2.
- However, it wants to pay part of the consideration on a deferred basis.
- This has now been clarified to be permitted.

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.

Swaps by FOCCs:
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.

Analysis: 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

Exit Routes and FEMA impact

Exit Routes for an Indian Investor from Overseas investments

- **Route 1 — Sale / Transfer to a Non-Resident**
- **Governing Provision:** Rule 17(1) of OI Rules, 2022 — transfer at arm's length.
- A person resident in India holding equity capital in accordance with OI Rules may transfer such investment in accordance with Rule 17 of OI Rules. Unless otherwise provided, such a transfer must comply with the limits and conditions for investment or disinvestment, pricing guidelines, and documentation and reporting requirements.
- **Conditions for full disinvestment (ODI):**
- The transferor, in case of full divestment (other than by way of liquidation), shall not have any outstanding dues to be received from the foreign entity (arising from equity or debt). For partial disinvestment, this condition does not apply.
- One-year minimum holding period must have elapsed (see below)
- Repatriation of sale proceeds within 90 days of receipt
- **Reporting:** Form FC (formerly Form ODI) filed with the AD Bank within 30 days of the disinvestment.

- **Route 2 — Sale / Transfer to Another Indian Resident**
- **Governing Provision:** Rule 17(2) of OI Rules, 2022.
- An Indian party can transfer its ODI stake in a foreign entity to another eligible Indian resident at arm's length pricing. The AD Bank must satisfy itself that the transfer is at arm's length. The transferee must be an entity eligible to make ODI under OI Rules (400% net worth cap, not in prohibited sector). This route is commonly used in group restructurings where ODI is consolidated under one Indian holding entity.

Exit Routes for an Indian Investor from Overseas investments

- **Route 3 — Liquidation / Winding Up of the Foreign Entity**
- **Governing Provision:** Rule 2(1)(d) OI Rules (disinvestment includes liquidation); OI Directions, 2022, Direction No. 13.
- When a foreign subsidiary is wound up, the Indian investor receives liquidation proceeds. Conditions:
- All liquidation proceeds must be repatriated to India within **90 days** of receipt
- Form FC to be filed with AD Bank within 30 days of disinvestment / receipt of proceeds
- It is clarified that where the transferor is required to repatriate all dues before disinvestment, such requirement shall not apply to dues that do not arise on account of investment in equity or debt — for example, export receivables. This is a practical relief — trade-related receivables do not need to be settled before the liquidation can be completed.

- **Route 4 — Write-Off of Capital in a Loss-Making Overseas Entity**
- **Governing Provision:** Rule 19 of OI Rules, 2022; OI Directions, 2022, Direction No. 12.
- This is a significant liberalisation under the 2022 regime. An Indian entity that has made ODI in a loss-making foreign entity can write off its capital without receiving any proceeds (i.e., absorb the loss) subject to conditions:
- The foreign entity must have been incurring losses for the **preceding 2 financial years**
- Automatic route: Write-off up to **25% of the Indian entity's equity investment** in the foreign entity

Exit Routes for an Indian Investor from Overseas investments

- **Route 5 — Swap-Based Exit (Securities Swap)**
- **Governing Provision:** OI Directions, 2022, Direction No. 13(3).
- In case of swap of securities, both legs of the transaction shall comply with FEMA provisions as applicable. However, where swap of securities results in acquisition of any equity capital which is not in conformity with the OI Rules / Regulations — for example, ODI in a foreign entity engaged in financial services activity, or a foreign entity having a subsidiary / SDS — such equity capital must be disinvested within a period of six months from the date of such acquisition.

- **Route 6 — OPI Exit (Portfolio / Listed Securities)**
- **Governing Provisions:** Schedule II of OI Rules, 2022; OI Directions, 2022, Direction No. 1(x).
- For Indian investors (listed companies, resident individuals under LRS) holding Overseas Portfolio Investment (OPI) — i.e., listed equity securities of foreign companies — the exit route is through sale on the relevant foreign stock exchange.
- Key rules:
- OPI by a person resident in India in the listed 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. Any further investment made in the equity capital of the foreign entity after its delisting shall be made as ODI.
- Sale proceeds (OPI) must be repatriated to India within **180 days** of receipt, unless reinvested

- **Route 7 — Restructuring of Balance Sheet of Overseas Entity**
- **Governing Provision:** Rule 18 of OI Rules, 2022.
- Under Rule 18 of the OI Rules, a person resident in India who has made ODI in a foreign entity can permit restructuring of the balance sheet by a foreign entity which has been incurring losses. This is not strictly an "exit" route but an intermediate tool — converting debt to equity, waiving receivables, or reducing capital — which may precede a write-off or partial disinvestment. The conditions under Rule 18 (2 years of losses, proportionate treatment of losses) must be met.

Exit Routes for NR Investor from Indian Investments

- **Route 1 — Secondary Sale to an Indian Resident**
- **Governing Provisions:** A person resident outside India holding equity instruments of an Indian company may transfer the same to a person resident in India by way of sale or gift, or may sell the same on a recognised stock exchange in India in the manner specified by the Reserve Bank from time to time.
- **Provision:** Rule 9(1) and Rule 9(2) read with Schedule I of NDI Rules, 2019
- **Reporting:** FC-TRS (Form) filed within 60 days of the transfer or receipt/remittance of funds, whichever is earlier
- **Pricing Rule:** The price receivable by the NR seller **cannot exceed** the fair value of the Indian company's shares, determined by an internationally accepted pricing methodology (for unlisted companies) or the SEBI-prescribed method (for listed companies). This is the most critical restriction — the foreign investor cannot exit at a price higher than fair value

- **Route 2 — Secondary Sale to Another Non-Resident**
- **Governing Provision:** Rule 9(3) of NDI Rules, 2019 — transfer of equity between two non-residents.
- Arm's length pricing required for both the seller NR and buyer NR
- Government approval required where the investee company operates in a sector requiring government route
- Pricing: the selling NR cannot sell below fair value; buyer NR cannot acquire above it
- FC-TRS filing mandatory

Exit Routes for NR Investor from Indian Investments

- **Route 3 — IPO / Sale Through Stock Exchange**
- **Governing Provision:** Rule 9(2) of NDI Rules — NR can sell shares on a recognised stock exchange in India.
- For FPIs (Foreign Portfolio Investors), this is the standard route — sale through the secondary market on NSE/BSE under Schedule II of NDI Rules. The secondary market price governs; no separate fair value certification is required.
- **FVCI Exception:** Unlike other modes of foreign investment, FVCIs are exempt from the pricing regulations with respect to both acquisition and sale of the securities in which they invest. Additionally, provided that an FVCI has held the securities in a company for a period of six months, it is exempt from the six-month post-IPO lock-in period which applies to other non-promoter shareholders. This makes the FVCI route particularly advantageous for PE/VC investors targeting early IPO exits.
- **Lock-in Issue:** Non-promoter foreign investors who are not FVCIs face a 6-month lock-in post-IPO before they can sell shares in the secondary market, under SEBI ICDR Regulations, 2018.

- **Route 4 — Share Buyback by the Indian Company**
- **Governing Provisions:** Section 68 of the Companies Act, 2013 (buyback eligibility), SEBI (Buyback of Securities) Regulations, 2018 (for listed companies).
- A foreign investor holding shares in an Indian company may tender those shares in a buyback offer — the company purchases back its own shares, resulting in the foreign investor exiting fully or partially. The buyback price is set by the company's board (for unlisted) or through reverse book-building / fixed-price route (for listed).
- **Tax Change — Finance Act 2024:** With effect from 1 October 2024, the income from share buyback has been shifted from the hands of the company (where it was taxed as distributed income) to the hands of the shareholder (taxed as dividend income). For foreign investors, this means the buyback proceeds are now subject to withholding tax under Section 195 / Section 115A of the Income Tax Act at applicable rates (or DTAA rates), rather than the company-level buyback tax. This significantly changes the post-tax economics of the buyback exit route for foreign investors.

- **Route 5 — Exercise of Put Options**
- **Governing Provision:** Rule 9(2A) of NDI Rules, 2019 — optionality clauses permitted subject to conditions.
- Both the Master Direction and the FEMA 20(R) provide that a non-resident holding capital instruments of an Indian company containing an optionality clause and exercising the option / right can exit without any assured return. The key conditions for a valid put option under FEMA are:
- Minimum 1-year lock-in before the put can be exercised
- The exit price **cannot** be pre-agreed at a fixed amount — it must be determined at fair value at the time of exercise
- No guaranteed IRR/floor return embedded in the put option price

Exit Routes for NR Investor from Indian Investments

- **Route 6 — Merger / Scheme of Arrangement (Inbound Merger)**
- **Governing Provisions:** FEMA (Cross Border Merger) Regulations, 2018 (FEMA 389/2018-RB); Section 234 of Companies Act, 2013; Rule 25A(5) Companies (CAA) Rules (fast track, September 2024).
- If the foreign investor's company itself is the entity being merged into an Indian company (inbound merger), the foreign investor receives shares of the surviving Indian company as consideration. This is effectively an exit from the original foreign investment in exchange for Indian equity. Alternatively, the Indian investee company may merge with a larger Indian acquirer — the foreign investor receives shares of the acquirer, which it can then exit via the secondary market.

- **Route 7 — Liquidation / Winding Up of Indian Company**
- **Governing Provision:** Section 271 / 309 of Companies Act, 2013 (court-supervised winding up); NCLT jurisdiction under IBC, 2016 for insolvency-based liquidation.
- On liquidation, the foreign investor receives liquidation proceeds after all creditors are paid. Repatriation of such proceeds is permitted under FEMA on a repatriation basis provided the original investment was made on repatriation basis. The proceeds are subject to Indian income tax — capital gains (where proceeds exceed cost) or capital loss (where proceeds are below cost, which may not be available for set-off against Indian-source income in all cases).

- **Route 8 — Deferred Consideration and Escrow Arrangements**
- **Governing Provision:** Rule 9(6) of NDI Rules, 2019; RBI Master Direction on Foreign Investment (20 January 2025) — clarified escrow.
- The NDI Rules stipulate that in cases involving the transfer of equity instruments between a person resident in India and a non-resident, the buyer may defer up to 25% of the total consideration for a period not exceeding 18 months from the date of the transfer agreement. This deferred consideration may be held in an escrow account with an AD Bank in India pending satisfaction of post-closing conditions (representations, indemnities). This is now a recognised route for exit transactions with earn-outs or locked escrow portions.

Key Factors to choose between restructuring options

- Prevailing valuations and stage of business
- Key Contracts to be evaluated if they allow assignment / novation
- India and overseas tax and legal considerations
- Disruptions to business model and operations
- Possibility to shift vendor registrations, employee contracts, ESOPs, government approvals, etc.
- Exit Route – viability and cost

Latest developments under FEMA

Ambiguity removed for Fast-track mergers

- RBI issued notification on 6 June 2026 amending the rules governing cross-border mergers under the Foreign Exchange Management Act, 1999 (FEMA).
- Prior to this amendment, FEMA regulations recognized only the National Company Law Tribunal (NCLT) for approving merger schemes.
- This meant fast-track mergers introduced under the Companies Act, 2013, which allowed approvals by the Regional Director and not NCLT, required prior RBI approval.
- Ambiguity now addressed by RBI replacing the term “NCLT” with the broader term “Competent Authority”
  - Fast-track mergers now enabled with deemed RBI approval under FEM(Cross Border Merger) Regulations, 2018.
- **Notification No. FEMA 389(1)/2026-RB dated May 29, 2026**

ECB for Acquisition Finance — The New Paradigm

ECBs can now finance strategic acquisitions involving acquisition of CONTROL — both domestic and cross-border (international). Effective 16 February 2026.

What is Permitted (ECB Route)

- Domestic & Cross-border Acquisitions allowed
- Control test: Acquisition must be for 'strategic purpose' — long-term value creation, not short-term financial gain
- Strategic corporate actions: Merger, demerger, amalgamation, arrangement
- Applicable laws: Companies Act 2013, SEBI SAST Regs, IBC 2016
- Security package: ECB may be secured over movable, immovable, financial and intangible assets
- MAMP: Standard 3 years; exception if repaid from foreign equity raise or on acquisition of control

What Remains Restricted (ECB Route)

- Minority stake acquisitions (non-controlling) – not allowed.
- ECB cannot fund incremental stake purchase and perpetual non-callable instruments
- Real estate business not permitted (existing restrictions remain)
- Financial sector entities: NBFCs, AIFs, FPIs, MFs — continue to have restricted end-uses
- Related party ECBs must be at Arm's Length
- FOCC restriction: FOCC (Foreign Owned/Controlled Companies) cannot use domestic bank debt for downstream acquisitions — but CAN use ECB

Procedural Changes

- Form ECB 1 & 2: Now cashflow-based, not monthly — significant procedural relief
- No NOC from AD Bank required for security creation, ECB term changes, ECB transfer by lender
- AD Bank remains the 'gatekeeper' — submission of Form ECB 1 before first drawdown
- Currency change: Now permitted FCY to FCY, FCY to INR, and INR to FCY
- Untraceable borrowers: RBI has formalised mechanism to flag non-reporting borrowers
- Existing ECBs (with LRN before 16 Feb 2026): Continue under old framework; only reporting follows new rules

Acquisition Finance - RBI Credit Facilities Amendment Directions 2026 - Key Parameters

Max Funding: Up to 75% of acquisition value (25% must come from acquirer's own funds — internal accruals / fresh equity)

Eligible Targets: Domestic and overseas companies — acquiring control. Must be strategic, long-term investment

Acquirer Eligibility: Financially strong companies with healthy balance sheets — minimum CRAR thresholds for bank

Excluded Borrowers: NBFCs, AIFs, and other financial entities cannot avail bank acquisition finance. FOCC limitation remains for downstream investments

Valuation Requirement: Independent valuation per RBI parameters; cannot be below/above fair value as prescribed

Security: Full security package: mortgage, pledge of acquired shares, parent/group corporate guarantee mandatory

Effective Date: 1 April 2026; banks may adopt earlier voluntarily

Indian banks can now fund strategic acquisitions effective 1 April 2026.

Bank Acquisition Finance — RBI Credit Facilities Amendment Directions 2026

- **Impact on Cross-Border Structuring**
- **LBO/Leveraged Acquisitions Now Viable**
  - India's first formal leveraged buyout framework. Previously, Indian companies had to use offshore debt (expensive) or promoter equity for acquisitions. Indian banks can now underwrite acquisition debt for domestic and overseas targets.
- **Domestic vs. Offshore Debt: A New Choice**
  - ECB route (Feb 2026) + Bank Acquisition Finance (Apr 2026) = dual funding pathways. ECB suited for offshore lenders / credit funds; bank financing for Indian bank syndicates. Pricing competition will narrow India's cost-of-capital gap.
- **FOCC Quirk – ECB Yes, Bank Debt No**
  - Foreign-Owned Indian Companies (FOCCs) can use ECBs to fund downstream acquisitions (2026 ECB Regs permit). But FEMA NDI Rule 23(4)(b) still bars FOCCs from using Indian bank debt for this purpose. ECB is the preferred route for FOCC acquisitions.
- **Prudential Guardrails – Not Free Leverage**
  - RBI imposes strict conditions: maximum 70% bank financing, full security package, mandatory repayment schedule, CRAR thresholds for lending banks, substance-over-form (group company SPVs: RBI assesses ultimate control). Not a blank cheque.
- **Impact under other laws - Must be checked**
  - Thin Capitalisation, Interest Deductibility, Exchange Fluctuation, GAAR, 'Purpose' Test and Transfer Pricing issues to be checked from Income-tax perspective, Companies Act compliances, SEBI Norms, NCLT approvals, etc.,

Other Legal and Practical Considerations

Reporting under FEMA

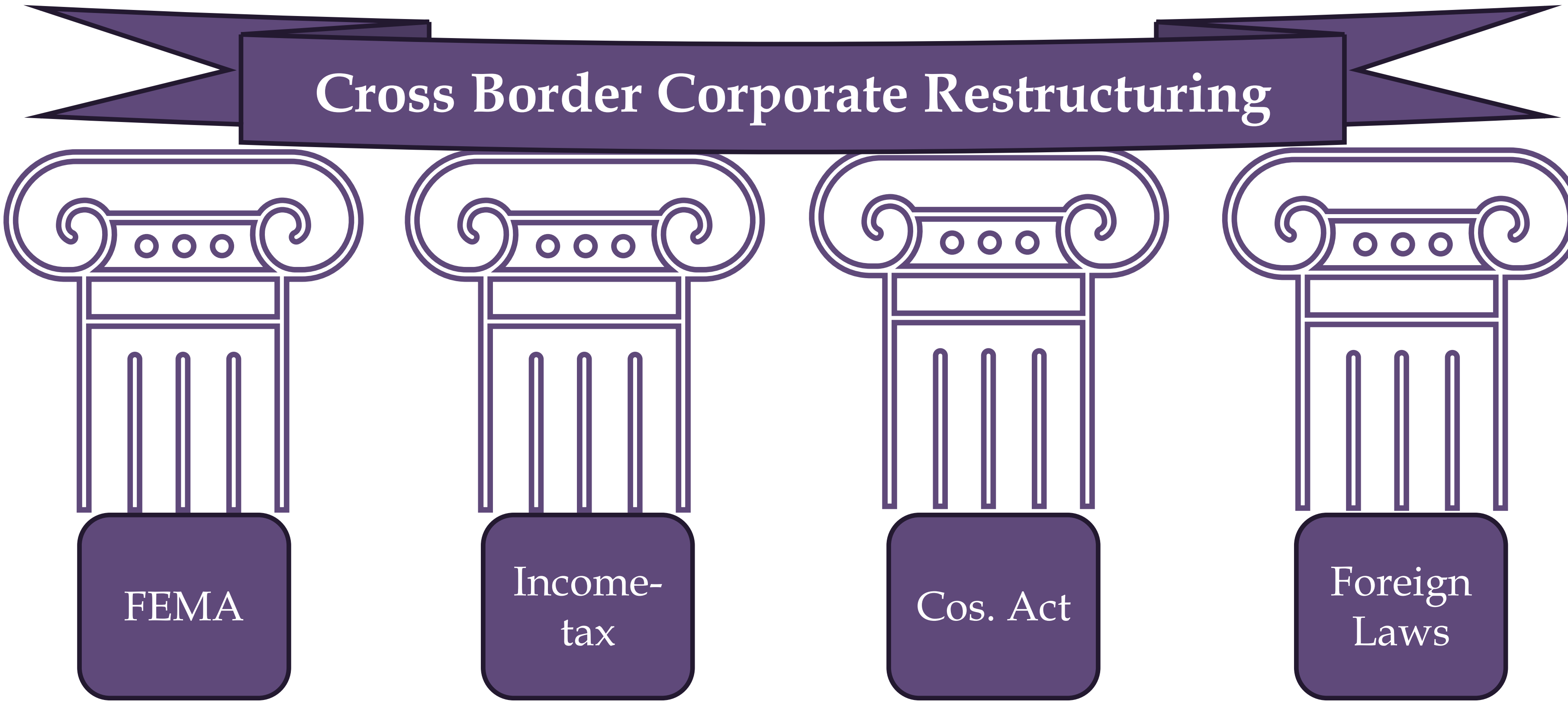
FEMA compliance does not end with structuring the transaction correctly. Every cross-border capital account transaction must be reported to the RBI within prescribed timelines:

Transaction	Form	Timeline
FDI — issue of shares to NR	FC-GPR	Within 30 days of allotment
FDI — transfer of shares to/from NR	FC-TRS	Within 60 days of transfer or remittance, whichever is earlier
ODI — any financial commitment abroad	Form FC	Within 30 days
Annual performance of overseas entity	APR (Form ODI-APR)	By July 31 each year
Downstream investment by FOCC	Form DI + DPIIT intimation	Within 30 days of allotment
FOCC reclassification	Form DI	Within 30 days of acquiring FOCC status

Importance of timely reporting

- A company with pending reporting violations (un-filed FC-GPR, un-filed APR, etc.) cannot:
  - Make a clean disinvestment of ODI
  - Obtain a clean FEMA compliance certificate for an IPO due diligence
  - Represent clean regulatory status to a potential acquirer
  - Access the "*suo moto*" compounding route
- In cross-border M&A due diligence, FEMA reporting gaps are now deal-breakers or at the very least price-adjusters.
  - A target with overdue reporting failures can lead to exposure that must be quantified and resolved before closing by way of compounding.

Four Pillars to Cross-border Corporate Restructuring



Income Tax Considerations in Cross-Border Restructuring

S. 47 Exemptions — Domestic Mergers

- S. 47(vi): Transfer of capital assets by amalgamating company to amalgamated Indian company — capital gains exempted
- S. 47(via): Shareholders of foreign amalgamating company receiving shares in Indian amalgamated company — capital gains exempted (where ≥25% of book value of assets are in India)
- S. 47(vib): Shareholders of Indian amalgamating company receiving shares in foreign amalgamated company — capital gains exempted (subject to conditions — rarely applicable)
- KEY GAP: No exemption for Indian company merging into foreign company (outbound) under the IT Act

Indirect Transfer Provisions — S. 9(1)(i)

- Explanation 5 to S. 9(1)(i): Transfer of shares in a foreign entity is deemed to arise in India if the entity derives 'substantial value' (≥50%) from Indian assets
- Applies to share sales of offshore holding companies whose value is primarily India-derived
- Highly relevant in cross-border restructurings involving MNC groups with large India operations
- DTAA relief may be available — check specific treaty provisions

Demerger — S. 2(19AA) & S. 47(vib)

- S. 2(19AA): 'Demerger' defined — requires all assets and liabilities of undertaking to transfer, and consideration only in shares
- Tax-neutral demerger requires compliance with §2(19AA) conditions — difficult to satisfy in cross-border demergers
- No explicit provision for cross-border demerger neutrality — significant tax risk
- Slump sale (S. 50B): Alternative route — indexation not available; entire net worth treated as cost

Withholding Tax & DTAA

- Dividend from foreign subsidiary: Taxable in India at applicable rates (S. 115BBD — 15% for specified foreign companies)
- Capital gains on sale of foreign shares: Taxable in India based on residential status; DTAA may exempt or reduce rate
- Interest on overseas debt assumed in restructuring: WHT under S. 195; DTAA benefits available
- Tax residency certificates (TRC) and LOB clauses critical for treaty access

Foreign Corporate Laws That Can Block Cross-Border Restructuring

Singapore

- Scheme of Arrangement: Requires approval of Singapore High Court + ACRA (Accounting and Corporate Regulatory Authority)
- ≥75% (by value) of creditors/shareholders present and voting must approve the scheme
- Separate class meetings may be required if rights are different — complex for MNC groups
- Zepto completed its reverse flip from Singapore in January 2025 — required both Singapore ACRA approval and Indian NCLT sanction, adding to timeline
- No Singapore equivalent of India's fast-track merger; standard High Court route unavoidable

United States (Delaware)

- Delaware General Corporation Law (DGCL §251 onwards): Mergers require Board approval + shareholder vote (majority of outstanding shares)
- Dissenters' appraisal rights (DGCL §262): Dissenting shareholders can demand judicial appraisal of fair value — potential cash payment obligation even in share-for-share mergers
- Groww (reverse flip from US) incurred USD 160 million in US tax costs — primarily due to capital gains triggered on US side
- Hart-Scott-Rodino (HSR) Act: Pre-merger notification required if transaction meets size thresholds (~USD 119 million in 2024)

Cayman Islands

- Companies Act (Cayman Islands): Merger requires approval of ≥75% of shareholders at a properly constituted meeting
- No concept of 'deemed approval'; formal court sanction or registered merger plan required
- Financial Regulatory Authority (CIMA) — financial services entities require CIMA approval
- Popular jurisdiction for VC-backed Indian startups; reverse flip involves Cayman merger plan + Indian NCLT
- No stamp duty in Cayman — but dissolution formalities and name strike-off required post-merger

United Kingdom

- Companies Act 2006, Part 26: Scheme of arrangement requires High Court of England & Wales sanction
- 75% by value + majority in number of creditors/shareholders in each class must approve
- FCA / PRA regulatory approval needed for regulated entities (banks, insurance companies)
- National Security and Investment Act 2021 (NSI Act): Mandatory notification for acquisitions in 17 sensitive sectors by any nationality buyer
- UK HMRC clearance advisable for complex reorganisations — CG65350 clearance procedure

Illustrative examples — jurisdiction-specific barriers practitioners must check for – collated with help of AI.

Other Legal Considerations — CCI, SEBI, Stamp Duty, ESOPs & Labour

CCI — Competition Law

- Competition Amendment Act, 2023: Deal value threshold — CCI filing required if deal value exceeds ₹2,000 crore AND the target has substantial business operations in India
- Cross-border transactions involving parties with India assets/turnover above thresholds: Mandatory pre-merger notification
- CCI has powers to impose conditions or block combinations that cause AAEC (Appreciable Adverse Effect on Competition)

Employee & ESOP Issues

- Cross-border merger: Foreign ESOP plans must be converted/replaced by Indian ESOP plans post reverse-flip; requires SEBI ESOS Guidelines compliance
- Labour laws: Transfer of business triggers potential retrenchment provisions; successor employer liability under ID Act
- Social security portability for international workers — tax implications on ESOP vesting across jurisdictions

Stamp Duty

- Court-approved schemes: Stamp duty generally levied on vesting of properties in resultant entity — rates vary by state
- NCLT/NCLAT-approved mergers: Stamp Act in certain states provides concessions; others do not
- Share transfers: SEBI dematerialised securities — 0.015% stamp duty on equity share transfers
- Careful analysis of overseas stamp duty rates and applicability

SEBI — Listed Companies

- SEBI LODR Regulations: Board meeting, stock exchange intimation, shareholders' approval (postal ballot) required
- Takeover Code (SEBI SAST Regs): Acquisition of ≥25% of voting rights triggers open offer obligation
- Delisting Regulations: If scheme results in delisting, SEBI delisting procedure must be followed
- Scheme filing with NCLT requires SEBI's no-objection for listed companies; SEBI scrutinises schemes of all listed entities

The Advisors' Step-wise Check list

- **Step 1:** Identify the persons to the transaction (residents vs. non-residents).
- **Step 2:** Classify the transaction as capital account or current account. If capital account, identify the permissive regulation.
- **Step 3:** Classify every instrument in the structure as equity or debt under FEMA. Identify the applicable regulation for each.
- **Step 4:** Check the entry route for the relevant sector and apply it throughout the investment lifecycle.
- **Step 5:** Ensure pricing complies with the applicable Rule 21 (NDI) or arm's length (OI) requirements for every transfer. Obtain the valuation in line with substance.
- **Step 6:** Analyse each leg independently. Confirm each leg is compliant. Ensure aggregate commercial effect matches commercial substance.
- **Step 7:** Identify whether deemed approval conditions are satisfied. If yes, proceed on compliance basis. If no, advise on prior RBI approval pathway and timeline.
- **Step 8:** Run through the four pillars – FEMA, Income Tax, Companies Act & Foreign Laws. Identify conflicts. Advise on resolutions.
- **Step 9:** Conduct a FEMA health check for past violations. Quantify compounding exposure. File suo moto if needed.
- **Step 10:** Plan the exit route and ensure that it will remain under FEMA compliance and out of grey areas.
- **Step 11:** Map all reporting obligations that arise and ensure they are timely complied with.

In Conclusion

- Varied structuring options now available
- Funding options liberalised
- However, FEMA can be a block to the plans – and the provisions keep changing, interpretations keep moving
- Better to review first rather than later
- Regularising after violating FEMA quite painful once transactions are done – compounding can be costly
- Valuation games are dangerous
- Several laws and factors to be considered – not just FEMA
- Overall objective can be met in a simpler manner – better to understand all requirements before providing advice

~~Look~~ Learn before your Leap

Thank You!

- Questions and comments are welcome.

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