

# Foreign Inbound Investment

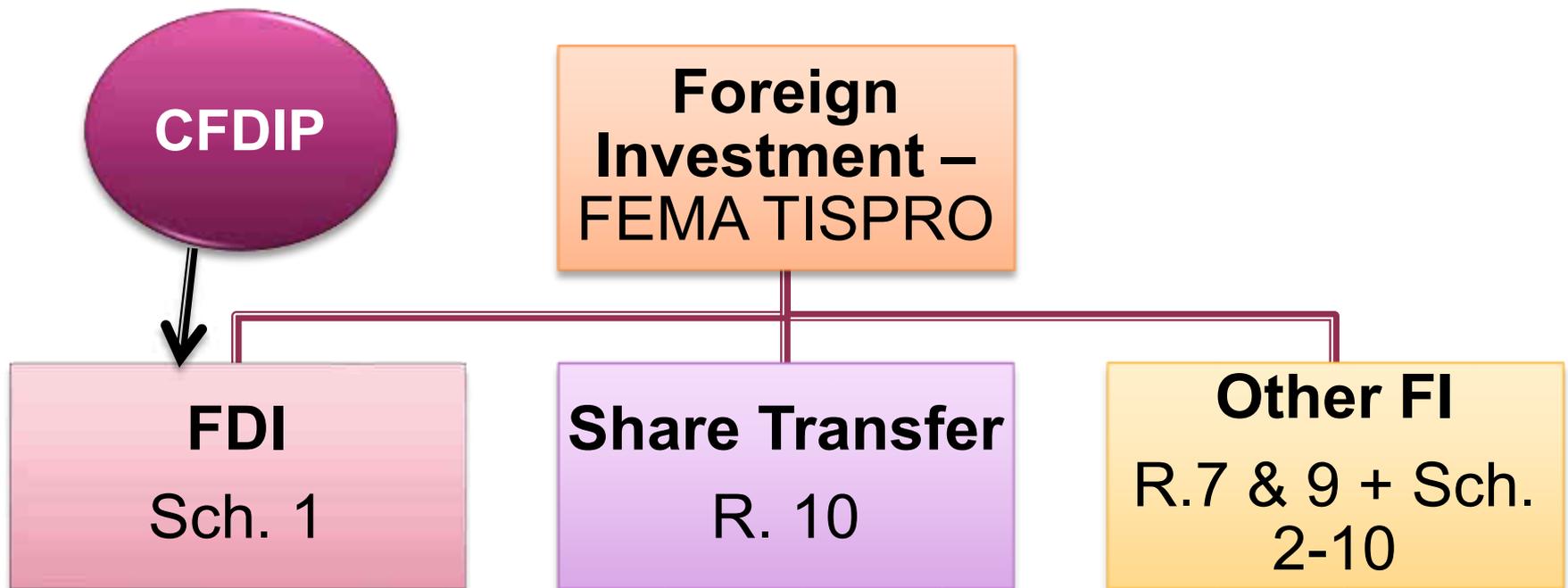
*2 Days Conference on FEMA, Delhi*

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**4<sup>th</sup> May 2019**

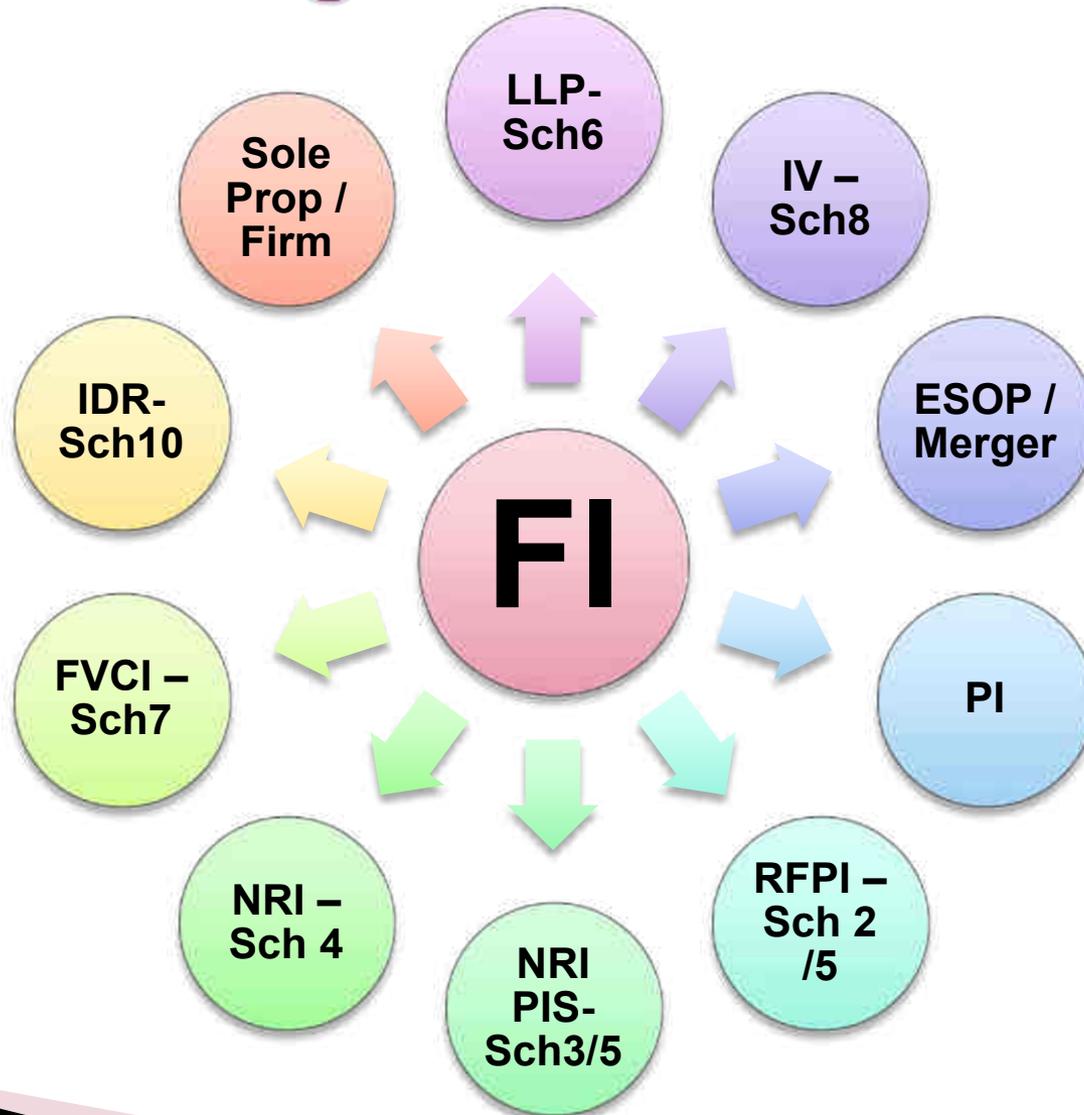


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# Foreign Investment Routes



# Other Foreign Investment





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# Foreign Direct Investment

# Foreign Direct Investment

- Definition of FDI / FPI
  - Foreign Investment in Unlisted Co. ~ **Always FDI**
  - FI in Listed Co. ~  $\geq 10\%$  in Listed Co. ~ **Always FDI**
  - FDI  $\geq 10\%$  in Listed Co. falling below  $10\%$  ~ **Remains FDI**
- ∴ FI by PROI  $< 10\%$  in Listed Co. ~ **Always FPI**
- Foreign Portfolio Investment different than FPI Investment
  - FPI only by SEBI-registered FPIs
  - Foreign Portfolio Investment **by any PROI**  $< 10\%$  in Listed Co.
    - Even Primary Subscription would be Foreign Portfolio Investment
    - No FC-GPR / ARF to be filed

# Foreign Portfolio Investment

- **Fresh Investment by Foreign Co. < 10% in Listed Indian Co.**
  - Treated as Foreign Portfolio Investment and not FDI
  - However, Foreign Co. would not be designated as FPI since it is not registered with the SEBI
  - Investment would be a Preferential Issue under SEBI ICDR Regs.
    - Pricing as per SEBI Regs.
    - Reporting not required
- **If Fresh Investment by Foreign Co. > 10%**
  - Treated as FDI
  - Pricing remains same
  - But Reporting required

# Foreign Portfolio Investment

- **If 10% ↑ then Total FI by such Foreign Investor reclassified as FDI**
  - ICO must then comply with ARF + FC-GPR Reporting
- But if FDI falls below 10% then not reclassified as Foreign Portfolio Investment ~ remains FDI
- For computing 10% consider Fully Diluted Capital of ICO

# FDI Sch. 1

- ▶ Foreign Direct Investment
  - Invst. by NR in Capital of an Indian Company under Sch. 1 of FEMA Regulations
    - Fresh Issue / Private Placement / Rights Issue to NR
    - Money comes directly into Indian Co.
    - FDI via Stock Market also permissible
      - Only for Foreign Promoters of Listed Cos.
      - Co. can issue shs in lieu of dividend payable to Promoter

# Regulators / Agencies

GOI

Fin Min

ComMin

DEA

RBI

DIPP

ECD

SIA

# Who Can Invest?

## Non-resident Entity

- Bangaldeshi / Pakistani citizens only by Govt route

## Bhutan / Nepal

- NRIs allowed on Repatriation basis
- FDI by Inward remittance in Forex

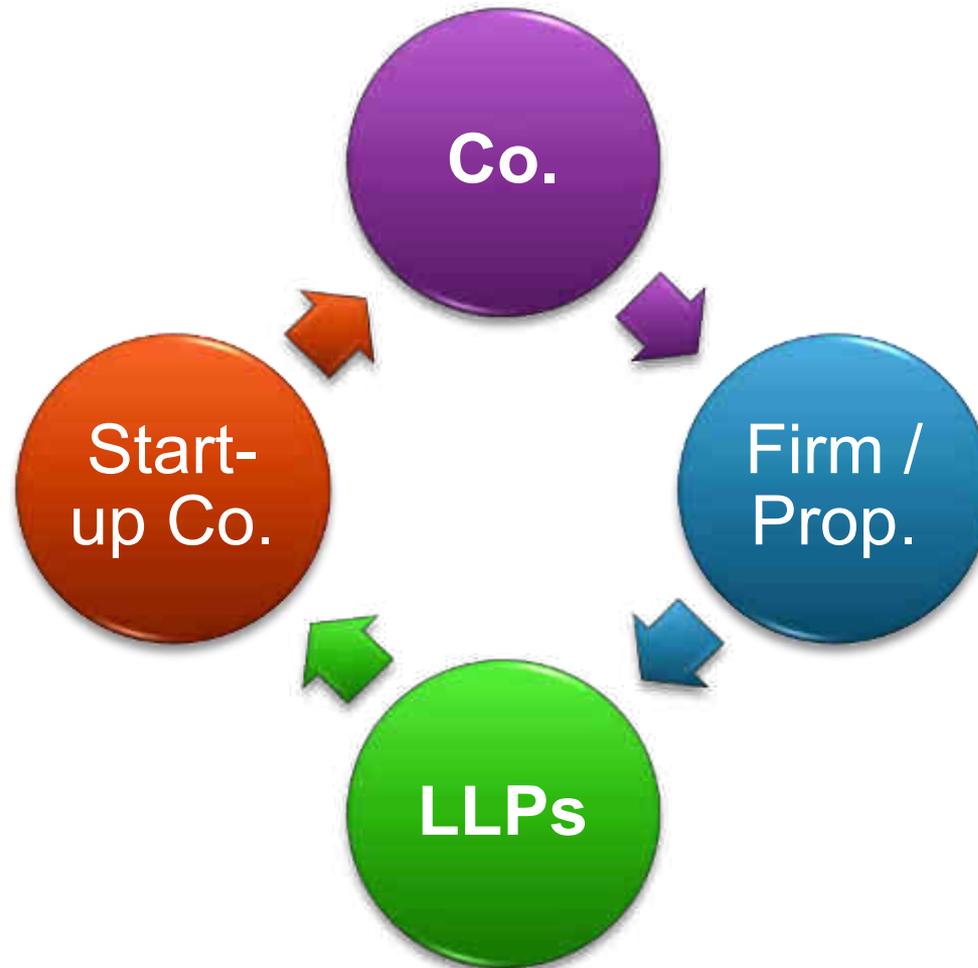
## Erstwhile OCBs

- Provided not on RBI's Watch List
- Can invest under FDI with RBI / FIPB approval

## FVCIs

- Can invest under FVCI Route in a VCF or under FDI route in a Company.

# Entities for FDI



# Types of FDI

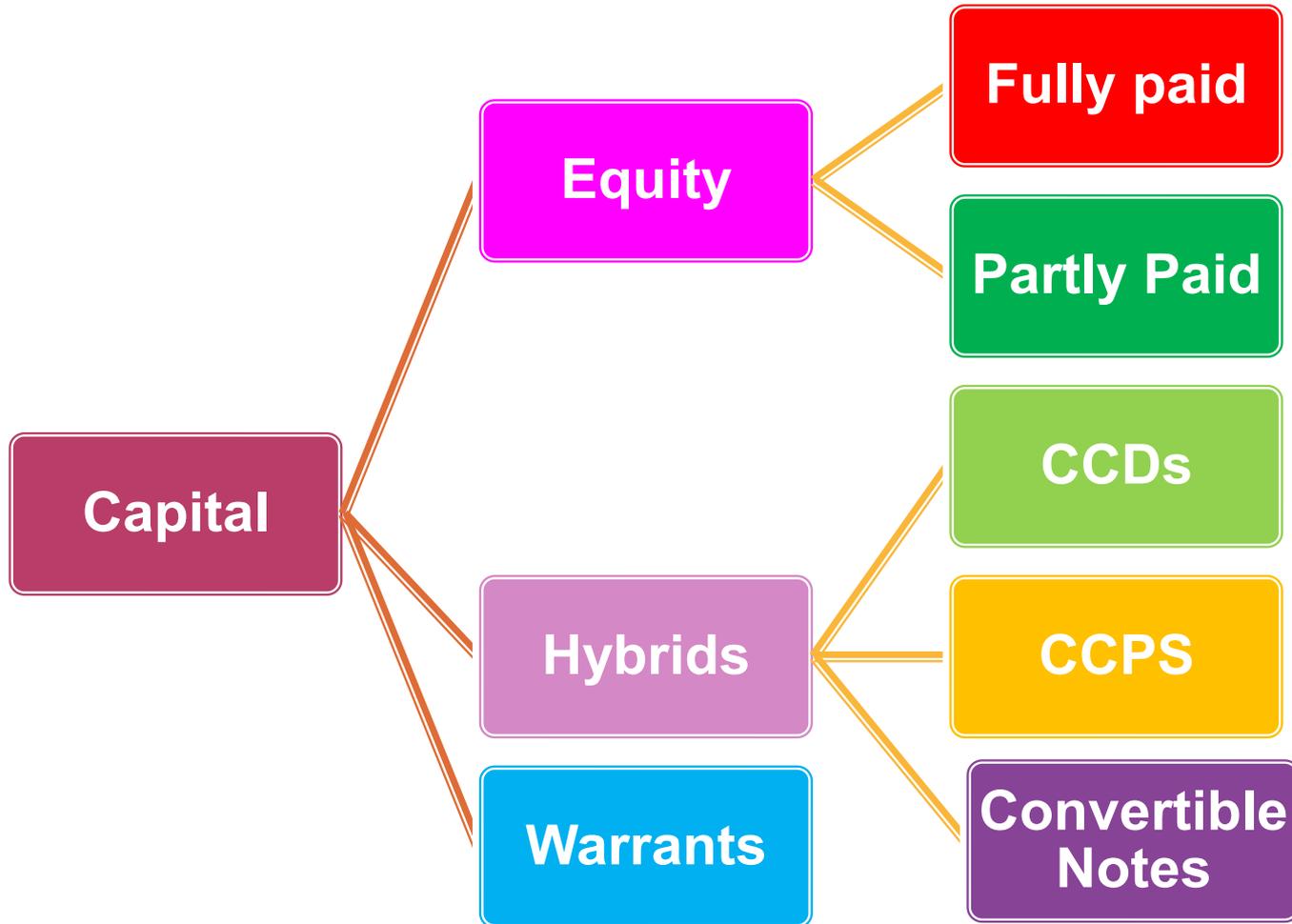
## FDI

**Automatic – Only Filings with RBI**

**Approval – Govt. - Ministries**

**FDI > Rs. 5000 cr.  
CCEA Approval**

# Instruments



# Equity Shares

- ▶ Consideration must be for Cash or allowed by CFDIP
  - Conversion of ECB / Royalty into Equity
  - Eq against Lumpsum FTS / Royalty
  - For Pre-inc. Exp. of WOS
  - For Import of Capital Goods / Machinery
  - Sh. Swap if Indian Co. in Auto Route sector
  - All other cases – Govt. approval
- ▶ Shares Must be issued within 60 days of funds ~ aligned with Companies Act since earlier was 180 days
  - Else refund the Amount

# Equity Shares

- Valuation - Issue Price of FDI Shares
  - Listed Cos. – SEBI Guidelines
  - Unlisted Cos. - Any Internationally accepted Pricing Method
    - Valuation by CA / MB
    - No Assured Returns
    - ALP Basis
    - No Method Specified ~ DCF / ECM / NAV / Price \* Book Value / SOTP / PE / Comparable Cases / Liquidation

# Preference Shares

- Part of Sectoral Caps Only if CCPS
  - If RPS / OCPS – treated as ECBs
- Must be converted within a reasonable timeframe
  - Amendment of tenure must be in compliance with Co.'s Act
- No Max. Dividend Rate
  - Earlier cap done away with
- DDT Payable

# CCDs

- Quasi-equity Instruments
- Subject to ECB restrictions?
- No Cap on Rate of Interest?
  - All-in-cost ceilings like ECBs?
- Tax Deduction benefits to Investee Co.
- Can be redeemed / bought back by Co.?

# Valuation of CCDs/CCPS

- Issue Price or Conversion Formula to be specified upfront at time of issue
- Price @ Conversion Date > FMV @ Issue Date
  - FMV = Any Internationally Accepted Method
- No Guaranteed Returns possible

# Partly Paid Shares & Warrants

- Partly Paid-up Shares
  - Auto Route Price determined upfront
  - 25% Upfront & Balance within 12 mts (can be received later if Issue > 500 cr Monitoring Agency appointed )
    - If balance not paid in time, 25% forfeited
- Warrants
  - Auto Route & issue as per SEBI Regs. –Even for Unlisted Cos?
    - Price upfront + Conversion Price  $\geq$  FMV on date of Warrants' Issue
  - 25% Upfront & Balance within 18 mts
  - If balance not paid then Forfeiture of Initial Amount

# Options & Guaranteed Returns

- Put & Call Options
  - Permissible in Equity / CCPS / CCDs
    - Minimum 1 year lock-in period or higher if prescribed for Sector
    - No Assured Returns
    - Exit Price as per FMV – Valuation to be done
- Guaranteed Returns
  - Not permissible for any Instruments
  - Not allowed even if Contractually Agreed upon

# Convertible Notes

- Can be issued only by Start-up Companies
  - FDI through C/Notes by Start-up Company
  - C/N = Initially debt but either repayable or convertible at Holder's Option or event based.
  - Max. 5 years for Conversion Option
  - Rs. 25 lakhs or more in a Single Tranche
  - If Govt. Route then with prior Approval
  - Eq. Shs. Against C/Ns as per Entry Route, Sectoral Caps, Pricing Guidelines

# FDI Prohibited - Taboo

1

- **Chit Fund / Nidhi**

2

- **Agricultural / Plantations (Exceptions)**

3

- **Real Estate Business / TDR Trading**

4

- **Gambling / Lottery / Casinos**

5

- **Atomic Energy**

6

- **Tobacco / Related Products**

7

- **Sectors not open to Private Sectors**

# Sectoral Caps

- FDI permitted up to Sectoral Caps, if any
  - If no Caps, then 100% FDI allowed on Auto Route
- Total FI cannot exceed Sectoral Cap
  - If Min. Cap. Requirement then Share Premium counted if received by Company
  - FDI for Investment Companies needs prior Govt. Approval
    - But if they are registered NBFCs then on Auto Route
  - FDI in Co. not yet started Ops.
    - Can be Auto FDI if Activities are under Auto Route
    - No Downstream Investment
    - When Ops commenced follow Sectoral Caps & Conditions
- Onus of Compliance on Indian Investee Company

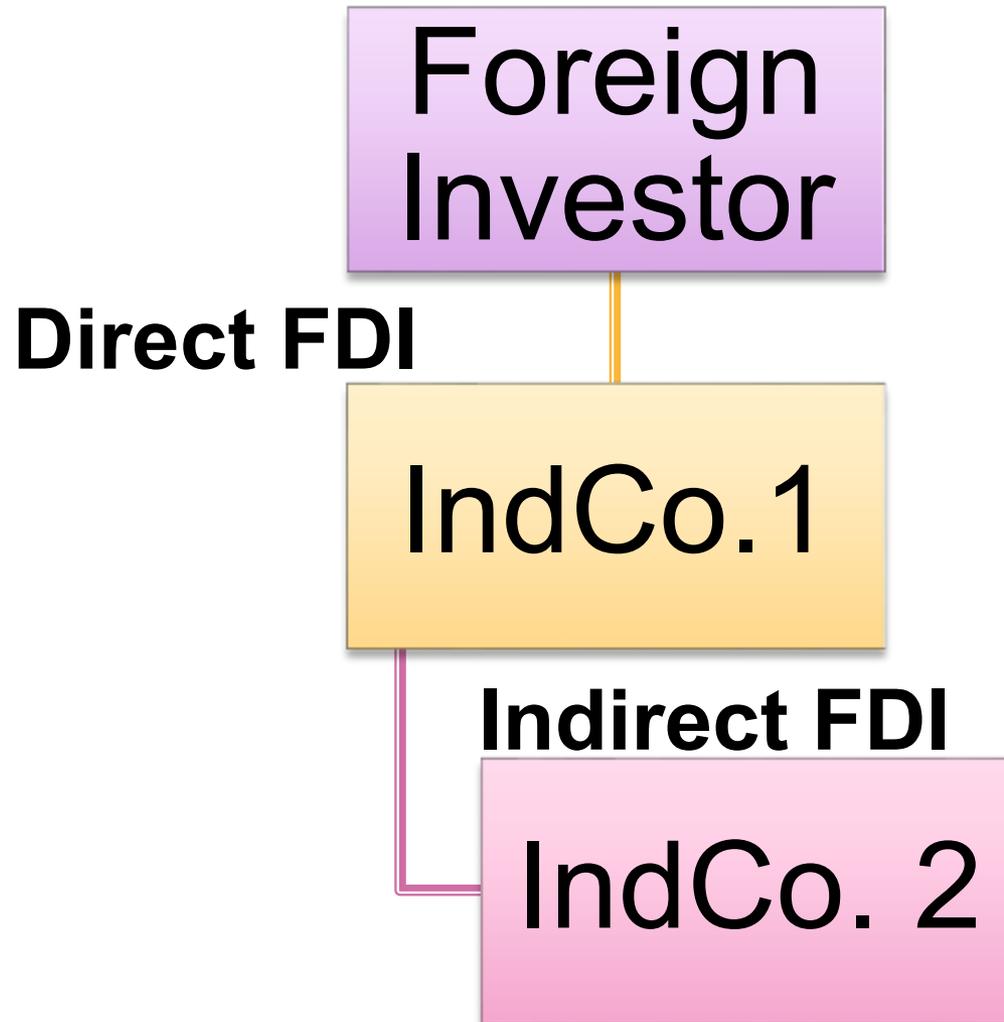
# FDI on Approval Route

- Apply to relevant sectoral authority ~ Nodal Ministry
  - If Doubt DIPP would determined relevant authority
- For rejection, DIPP concurrence is a must
- Online filing of application [www.fifp.gov.in](http://www.fifp.gov.in)
- Comments by Authority within 4 weeks
  - Else Deemed to have No comments
- For certain Sensitive Sectors (Defence, Aviation, Telecom) – Home Ministry Comments also needed
- Authority can ask DIPP for clarifications, if any on FDI Policy

# FDI on Approval Route

Sector & Nodal Authority	Sector & Nodal Authority
Titanium Mining – Ministry of Mines	Above 49% FDI in Private Sector Banking – Dept. of Financial Services
Petroleum refining by PSUs	Above 49% FDI in defence – Defence Ministry
Print Media / Uplinking of News TV Channels / FM Radio / Publishing – Ministry of Info & Broadcasting	Above 74% FDI in Brownfield Pharma - Dept. of Pharmaceuticals
Private Security Agencies – Home Ministry	Multi-Brand Retail Trading - DIPP
Above 49% FDI in Telecom - Dept of Telecom	Core Investment Company – Dept. of Economic Affairs
Satellites – Dept. of Space	Countries of Concern - DIPP

# Indirect / Downstream FDI



# Indirect FDI

- FDI via Indian Cos
  - Owned & Controlled by Resident Indians Citizens = Domestic Investment not counted as FDI
  - Owned **OR** Controlled by NRs = Downstream is Indirect FDI
  - Ownership
    - More than 50% of Capital (Eq /CCD/CCPS)
  - Control
    - Right to appoint a majority of Directors or to control management or policy decisions including by virtue of their Shareholding or Management Rights or SHA or Voting Agreements

# Indirect FDI

FDI% in Indco controlled by Residents	Indco's Investment in SPV	Indirect FDI in SPV
40%	51%	Nil – Indco is O&C by Indians
75%	26%	26% - Indco is O or C by NRs so entire Downstream is Indirect FDI
60%	100%	60% - Downstream in SPV is a mirror image of Indco

# Indirect FDI Conditions

- 2<sup>nd</sup> Level Investee Co. must comply with
  - Entry Route
  - Sectoral Caps
  - Pricing Guidelines
  - Other FDI linked Performance Conditions
- As if it is a Direct FDI

# Indirect FDI Conditions

- 1<sup>st</sup> Level Investor Co.
  - Must have a Board Resolution approving the Indirect FDI
  - Must have Shareholders' Agreement
  - Must Not raise funds for Invst. Via Domestic Markets
  - Can use Internal Accruals / Foreign Funds
  - Is responsible for compliance with FEMA Regs.
    - Obtain Auditors' Certificate + Report in Directors' Report
    - If Qualified Audit Report then inform RO of RBI

# FDI Compliance

- Reporting of FDI Inflows to RBI be done by AD Bank
  - ARF+ KYC now not required
- Reporting of Issuance of Shares within 30 days to RO of RBI –**Form FC-GPR (Foreign Currency Gross Provisional Return)**
  - Signed by MD / Dir
  - Valuation Certificate from CA / Auditor
  - Certificate from CS of Co.
    - All requirements of the Companies Act, 2013 have been complied
    - Conditions of Government approval, if any, have been complied with.
    - Co. is eligible to issue Instruments under FEMA TISPRO
    - Co. has all original certificates issued by AD in India, evidencing receipt of amount of consideration

# FDI Compliance

- If shares issued to a PROI other than one from whom funds received
  - KYC of both persons + relationship of two + NOC from remitter + Board Resolution of Investee Co for such issue
- Declaration in FC-GPR that FDI would be used in compliance with PMLA & FDI complies with all provisions of PMLA / its Rules
  - However, FEMA not a Scheduled Offence under PMLA
- **Annual Return** of Foreign A &L in **Form FLA** by 15<sup>th</sup> July

# Rights / Bonus

- Auto Route Investment for Rights / Bonus if:
  - Companies Act, 2013 complied with
  - Sectoral Caps post-issue not breached
  - Original Shares in accordance with FEMA Regs.
  - New Shares subject to same conditions as Original
  - Listed Co ~ Rights to NR @ Price determined by Co.
  - Unlisted Co ~Rights to NR @ price not less than that of Res.
  - NR can over-subscribe for Rights
  - Res / NR can renounce his Rights entitlement
    - Renouncee can acquire Rights Shares as per above Pricing Guidelines
    - Rights Shares subject to same repatriation as Original Shares

# Merger & ESOPs

# ESOPs – R. 7 of TISPRO

- Indian Cos. Can issue ESOPs / Sweat Equity to
  - NR Eees / Directors of self / Holdco / JV / Sub
  - Scheme must be as per SEBI Regs. or Companies Act
    - Defn. ~ ESOP issued under SEBI Regs. – Even for Unlisted??
  - ESOP within Foreign Sectoral Caps applicable to Co.
    - Earlier limit of 5% now deleted
  - If FDI on Govt. Route then ESOP requires CG Approval
    - E.g., NR ESOP in Private Security Agencies
  - ESOP to Pakistan / Bangladeshi citizen – CG Approval

# Mergers – R. 9 of TISPRO

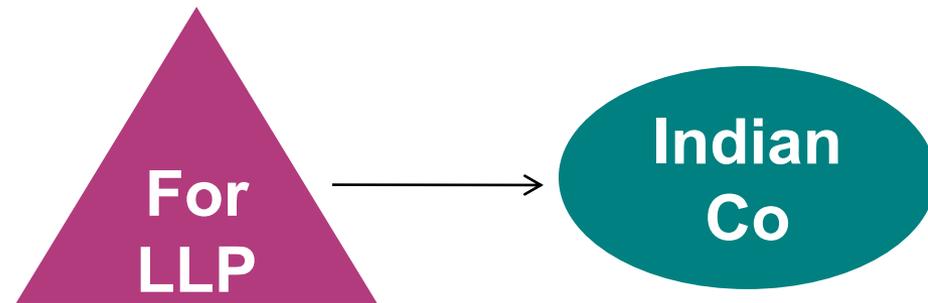
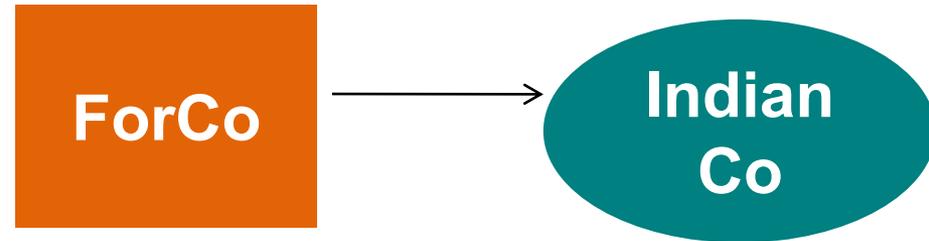
- Indian Cos. can issue shares to NR Shareholders of:
  - Indian Transferor companies in a Scheme of Merger / Demerger / Reconstruction
    - % of NR shareholding in Transferee within Sectoral Caps or as per CG approval, if any
    - Issue – Compliance with Entry Routes / Investment Limits
    - Transferor / Transferee Not in FDI Prohibited Sectors – e.g., Merger of Gambling / Casinos Co. – Listed Co. in this field
    - Scheme approved by NCLT in India

# Foreign Mergers

- Under Cos. Act 2013
  - S.234 - Foreign Co. can merge with an Indian Co.
    - Provisions of mergers under the Act apply to such mergers also
    - Rule 25A of Companies (Arrangements & Amalgamations) Rules
    - NCLT permission required for Indian leg
    - Foreign Court's permission depending upon jurisdiction
    - Fco can merge with Ico after obtaining prior approval of RBI and complying with ss.230-232 of the Act
    - RBI has issued Regulations under FEMA granting permission

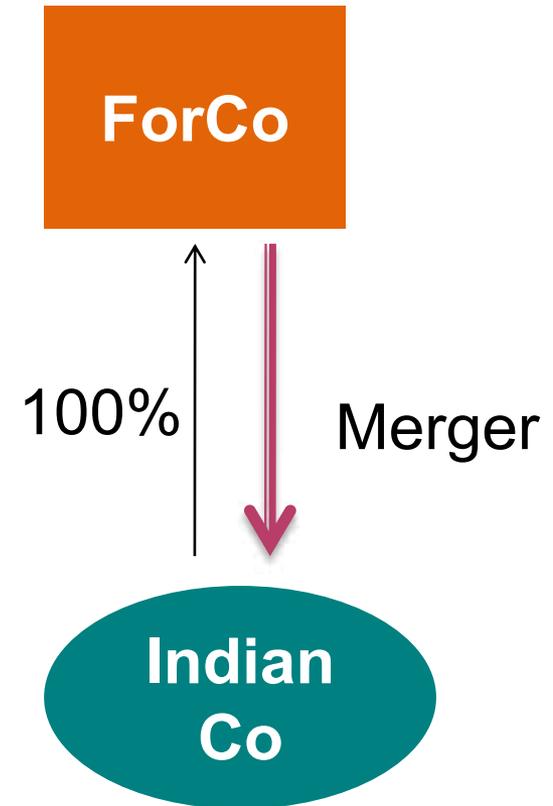
# Foreign Mergers

- **FEM (Cross Border Merger) Regs., 2018**
  - **Inbound Merger** – merger of Foreign Co. into Indian Co.
  - Foreign Company – Companies Act
    - Can be a Company or Body Corporate Incorporated Abroad
    - Thus, ForCo or ForLLP can merge with Ico – **Qube Cinema Tech (NCLT Chennai)**



# Foreign Mergers

- **FEM (Cross Border Merger) Regs., 2018**
- Merger of ForCo which is WOS with ICO Parent
- In case Fco is WOS of Ico then comply with conditions for transfer of shares under No. 120/2004 – R. 16(1) /(2) e.g.:
  - Sale does not result in w/off
  - Q. How would it be satisfied in case of a merger of WOS with ICo?



# Foreign Mergers

- **FEM (Cross Border Merger) Regs., 2018**

- Resultant Indian Co. can issue shares to PROIs
  - Follow Pricing G/L + Sectoral Caps + reporting under TISPRO
  - Foreign Office of Fco deemed to be branch of Ico
  - Borrowings of Fco become those of Ico and shall conform to ECB Regs within 2 years – No remittance for repayment of such Borrowings within 2 years
  - Ico can acquire / hold any foreign asset if so permissible under FEMA
    - Else sell it within 2 years of sanction of scheme
  - Ico can maintain foreign bank A/c for 2 yrs for incidental transactions

# Foreign Mergers

- **FEM (Cross Border Merger) Regs., 2018**
  - Valuation done as per Rule 25A
    - Indian Co. by Indian Valuers and For Co by Foreign valuers
  - Reporting as may be specified by RBI
  - If merger as per Regs then treated as deemed approval of the RBI
  - Compliance certificate by MD / CS of these Regs to be furnished to NCLT

# Arrangement – R. 9 of TISPRO

- Indian Co. can make a Bonus issue to NR Shareholders :
  - Non-convertible Redeemable Preference Shares / Debentures
  - Under a Scheme of Arrangement approved by NCLT under Companies Act 2013
  - Co. not engaged in Sectors where FDI Banned
    - E.g., Tobacco / Gambling
  - E.g.,: HUL / NTPC / Zee / Blue Dart issued Bonus NCD / RPS
  - Earlier Condition deleted of Co. obtaining NOC from ITO

# Non Repatriable

# Sch. 4: Non-Repatriable FI

- Non-Repatriable Meaning:
  - Only Dividend / Interest can be sent back abroad
  - Principal + Gains cannot be repatriated
- NRI/PIO can buy shares / CDs / warrants on NR Basis:
  - ***Investment treated as Domestic Investment***
  - Not Nidhi / Chit Fund / Plantations/ Farm Houses / Dealing in TDRs / Real Estate Business
    - RE Business means Dealing in land to earn profits but excludes Leasing of property / Investment in REIT units.

# Sch. 4: Non-Repatriable FI

- NR Investment includes investment in the following:
  - Listed Securities - Eq / CCPS / CCD / Warrants
  - Unlisted Securities - Eq / CCPS / CCD / Warrants
  - Units of an Investment Vehicle ~ REITs / AIF / Invlts
  - LLP's Capital
  - Convertible Notes issued by a Startup
  - Sole Proprietary Firm's Capital
  - Partnership Firm's Capital
- **IMP Restriction** – **OCPS/NCD/OCD/ RPS**. Though Invst is Domestic, Instruments remain Foreign? **Strange!**

# Sch. 4: Non-Repatriable FI

- Sch. 4 Route open to:
  - NRIs: Indian Citizens residing abroad OR OCI Cardholders
    - If a PIO is not registered as an OCI Cardholder – Not treated as NRI under FEMA and he Can't avail of Sch. 4
  - Foreign Company/ Trust/Firm owned & controlled by NRIs
  - What is O & C by NRIs?
    - No definition in Sch. 4 so Refer to R. 14
    - Ownership – 50%+ of Share Capital / LLP beneficially owned by NRIs
    - Control – right to appoint majority of Directors / Partners / DPs with NRIs

# Sch. 4: Non-Repatriable FI

- For Sch. 4:
  - No Pricing Norms unlike Sch. 1
  - No Filings for FDI: FC-GPR, FC-TRS, FDI-LLP, FLA
  - Not counted for Direct / Indirect FI Limits for O&C
  - Can invest in Multi-brand Retailing / Telecom / Airlines, etc.
  - No cap on Dividend on CCPS
  - No bar to investing in Tobacco / Gambling / Lottery / Sectors not open to private investment (Railways)

# Sch. 4: Non-Repatriable FI

- Sale Proceeds of NR Investment must be credited to NRO A/c.
- However, under FEM (Remittance of Assets) Regulations, 2016
  - Every NRI can repatriate up to \$1 million / year out of sale proceeds of assets

# Firms & LLPs

# FDI in Proprietary & Firms

- Foreign Investment allowed in Sole Proprietary concerns & Partnership Firms for:
  - NRIs / OCI on Non-Repatriation basis on Auto Route
  - **Express Prohibition for all Other FI in Firm / AOP / Sole Prop.**
    - **AOP covered for first time ~ FI permissible with RBI permission**
  - **Earlier Express Permission Now removed:**
    - NRIs / PIOs on Repatriation basis with RBI + GoI permission
    - Other Foreign residents with RBI + GoI permission
- Restricted Sectors for NRIs/ OCI:
  - Agricultural / Plantation / Real Estate Business / Print Media

# Sch. 6: LLP

- Auto Route FDI in sectors with No performance conditions and Where 100% FDI is allowed
- No FDI in Sectors with performance linked conditions
  - Q NBFC, Housing, Trading not possible?
  - Q. What is Performance Linked Conditions?
  - **Would Guidelines for Cash & Carry WT be treated as PLC?**
    - Requirement of trade licence of valid business customers
    - Maintenance of Full records
    - Group Co. sales threshold
  - **Would Guidelines for SBRT be treated as PLC?**
    - Sourcing Requirements from India

# Sch. 6: LLP

- No FDI in
  - Sectors eligible to receive less than 100% FDI under Auto Route
    - FM Radio / TV News / MBRT/Banks /Insurance / Print Media
  - Sectors where FDI possible only with Govt. permission
    - Mining / Defence / Publishing Journals / Brownfield Pharma
  - Sectors not opened up for FDI
    - Tobacco / Railways

# Sch. 6: LLP

- Investment in LLP:
  - Contribution to capital is an eligible investment
  - Contribution to capital of LLP should be subject to compliance of LLP Act, 2008.
- Pricing:
  - Capital Contribution  $\geq$  FMV worked out as per any Int'l Accepted Valuation Methodology by CA / CMA / Regd. Valuer
  - Transfer of Capital Contribution or profit Share from R to NR  $\geq$  FMV
- Payment
  - Only Cash Consideration (no CoC though allowed under LLP Act)
  - Inward remittance / NRE / FCNR (B) Account

# Sch. 6: LLP

- Foreign Investors not allowed to Invest in LLP:
  - Pakistani / Bangladeshi entity / citizen
  - FVCI
  - RFPI
- LLP to file Form Foreign Direct Investment-LLP(I) with RBI RO
  - Copy of FIRC/s + KYC report on NR investor + Valuation certificate within 30 days from Receipt of consideration.
  - RO would allot a Unique Identification Number (UIN)
  - Transfer of Capital / Profit share reporting in FDI-LLP(II) within 60 days of receipt of funds

# Sch. 6: LLP

- To and From Conversion
  - Auto Route Conversion of Co. with FDI into LLP only if
    - Sector where FDI up to 100% on Auto Route
    - No FDI linked Performance Conditions
    - Possible under Schedule II & III of LLP Act, 2008 + s.47(xiiib) of ITA
  - Auto Route Conversion of LLP with FDI into Co. only if
    - Sector where FDI up to 100% on Auto Route
    - No FDI linked Performance Conditions
    - Possible under Chapter XXI of Companies Act, 2013

# PIS by FPIs & NRIs

# Foreign Portfolio Investment

- New Definition of Foreign Direct Investment & Foreign Portfolio Investment
- Definition linked to % of Investment in Indian Company / Type of Indian Company – listed / unlisted
- NOTE: Foreign Portfolio Investment different than Foreign Portfolio Investor or FPI
  - FPI only by SEBI-registered FPIs
  - Foreign Portfolio Investment **by any PROI** < 10% in Listed Co.
    - Even Primary Subscription would be Foreign Portfolio Investment
    - No FC-GPR / ARF to be filed

# Foreign Portfolio Investment

## FI in Unlisted Co

- Always treated as FDI
- % Irrelevant

## FI of 10% or More in ListCo

- Always FDI even if by an FPI
- % Threshold Matters

## FI of Less than 10% in ListCo

- Always FPI
- % Threshold Matters

## FI > 10% in ListCo falling below 10%

- Remains FDI
- Change in % does not matter

# Foreign Portfolio Investment

- **Fresh Invst by For Co. less than 10% in Listed Indian Co.**
  - Treated as Foreign Portfolio Investment and not as FDI
  - However, Foreign Co. would not be designated as RFPI since it is not registered with the SEBI
  - Investment would be a Preferential Issue under SEBI ICDR Regs.
    - Pricing as per SEBI Regs.
    - Reporting not required
- If Fresh Investment by Foreign Co. of 10% or more
  - Treated as FDI even if by a SEBI-registered FPI
  - Pricing remains same
  - But Reporting required to RBI as if an FDI

# Foreign Portfolio Investment

- If Invest by a RFPI increases to 10% or more then Total FI by such RFPI reclassified as FDI
  - ICO must then comply with ARF + FC-GPR Reporting
- But if FDI falls below 10% then not reclassified as Foreign Portfolio Investment ~ remains FDI
- For computing 10% consider Fully Diluted Capital of ICO

# Sch.2: PIS by RFPI

- ▶ FPI Regime – Registered Foreign Portfolio Investor
  - Must be registered with SEBI – 3yrs Regn at a time
  - **Cat I FPI**: Sovereign Wealth Funds / Govt. / Central banks
  - **Cat II FPI**: Regulated Broad-based Funds with Min. 20 investors & Max. Invst per Investor 49% of Units / University Funds / Mutual Funds / Banks / Portfolio Managers
  - **Cat III FPI**: Corporate Bodies, Trusts, Family Offices / Individuals
    - Earlier NRIs were not permitted to register as RFPI
    - But if a Fund has NRIs it could register as an RFPI

# Sch.2: PIS by RFPI

- Changes for NRIs wef 21<sup>st</sup> Sept 2018
  - NRIs / OCIs / Resident Indians allowed as constituents of FPI
    - Contribution by single such Investor must be below 25% & in aggregate below 50% of corpus of the FPI
    - They cannot be in control of FPI
    - FPIs can be controlled by Invst Managers which can be C&M by such Investors
      - IM must be regulated in its Home Jurisdiction + registered with SEBI; or
      - IM is set up in India and registered with SEBI

# Sch.2: PIS by RFPI

- All existing Investments as QFI / FII / SA grandfathered with RFPI regime and can continue as FPI
- FVCI can also register as FPI
  - Segregation of Portfolios
  - Reporting Separately
- As the Category ↑ KYC Requirements also ↑
  - Cat I has least and Cat III has maximum
  - Must be registered with DDP (Designated Depository Participant) approved by the SEBI

# Sch.2: PIS by RFPI

- Can Invest in Listed Shares / CCDs / Warrants
- Holding/ RFPI  $\leq$  10% & Total  $\leq$  24% of Capital
  - 24% can be  $\uparrow$  to Sectoral Cap by Spl. Resln.
  - Buy from Inward remittances / Indian Re. or \$ Bank A/c.
  - One FPI can invest up to 10% of Capital of a Company
- Sale only on Stock Exchange
- Must do delivery based trades only
  - But can Short Sell + do Stock Lending
  - Can also do Stock lending and Borrowing

# Sch.2: PIS by RFPI

- Can participate in Buy-backs / Open Offers / Delisting of Shares held by them / Divestment by Gol
- Can also invest under Sch. 1 FDI but the terms and conditions applicable to FDI – Pricing / Reporting would apply to FDI
- Can invest in Indian PMS
- Can also Invest in IPO of securities ~ treated as PIS
  - Conditions for FDI not applicable to an IPO to FPI

# Sch.2: PIS by RFPI

- Can even invest in Private Placement / Preferential Allotment of securities under PIS Route
  - E.g., Nandan Denim issued 10 lakh warrants @ Rs. 80/ share to LGOF Ltd, an RFPI on Private Placement basis
- However Pre-IPO placement to FPI treated as FDI
  - Required to follow FDI Conditions
    - E.g., Pre-IPO placement to FII by Oberoi Realty / Godrej Properties was treated as FDI and required to adhere to P/N 2 of 2005 conditions but not so for their IPO investment

# Sch.2: PIS by RFPI

- FPIs can also invest in units of REITs / AIFs / InvIts
- RFPI can open Foreign Currency A/c or a Special Non-resident Rupee A/c for routing receipts & payments
  - Credits ~ Inward remittance / sale proceeds
  - Debits ~ Purchase / repatriation
  - No Interest on these Accounts
  - Remittance allowed after Tax Payments

# Sch.2: PIS by RFPI

- No Sectoral Caps for PIS – Multi-brand / Defence / Airlines
  - Earlier Print Media – Mid-day IPO – but now removed
  - RFPI Holdings in Companies where FDI is conditional:

Company	Sector	% RFPI Holding
HDFC	NBFC	71%
Future Lifestyle	Multi-brand Retail	15%
Idea Cellular	Telecom	26%
HDFC Bank	Banking	41%
DLF	Real Estate	16%
Delta Corp	Gambling	24%
Interglobe Aviation	Aviation	15%
HT Media	Print Media	7%

# Sch.3: PIS by NRIs

- NRIs can purchase Shares / CDs / Warrants on PIS:
  - On repatriation basis
  - Paid-up value of Shares / CDs / Warrants  $\leq 5\%$  per NRI
  - Aggregate shares / CDs / Warrants by all NRIs  $\leq 10\%$ 
    - Can  $\uparrow$  to 24% by passing Spl. Resln.
  - Delivery based buying / selling
  - Can open an NRE PIS A/c with a Bank for buying under PIS
  - Sale Proceeds from such PIS also credited to this A/c

# Sch.3: PIS by NRIs

- Bank must ensure that sale proceeds from other investments, such as FDI not credited to NRE PIS A/c.
- Remittance abroad allowed after Taxes
- Bank must report all PIS transactions by NRIs to RBI
- Earlier Sch. 3 provided that PIS would be subject to Sch1 for Sectoral Caps & Restrictions ~ Now Deleted?

# Sch. 5 : Other Investments by NRIs

- NRI can also invest on Repatriation Basis
  - Units of MFs or CIS or Infrastructure Debt Funds
  - T-Bills
  - Derivatives
  - Perpetual Debt Instruments by Banks
  - Listed Non-convertible Debt / RPS under a Scheme
  - National Pension Scheme

# Sch. 5 : PPF by NRIs

- NRIs cannot open PPF / Buy NSCs
  - Were allowed to contribute to Old PPF opened when R
- Circular: R who had a PPF becomes an NRI, A/c is deemed to be closed wef the day he becomes an NRI
  - Interest wef that date @ 4% p.a. up to the last day of the month preceding the one in which A/c is actually closed
  - However, this Cir kept in abeyance – thus, can continue till maturity
- NSC is deemed to be encashed on the day the holder becomes an NRI - Interest wef that date @ 4% p.a. till actually encashed
  - This Cir not kept in abeyance

# IDRs / ADRs

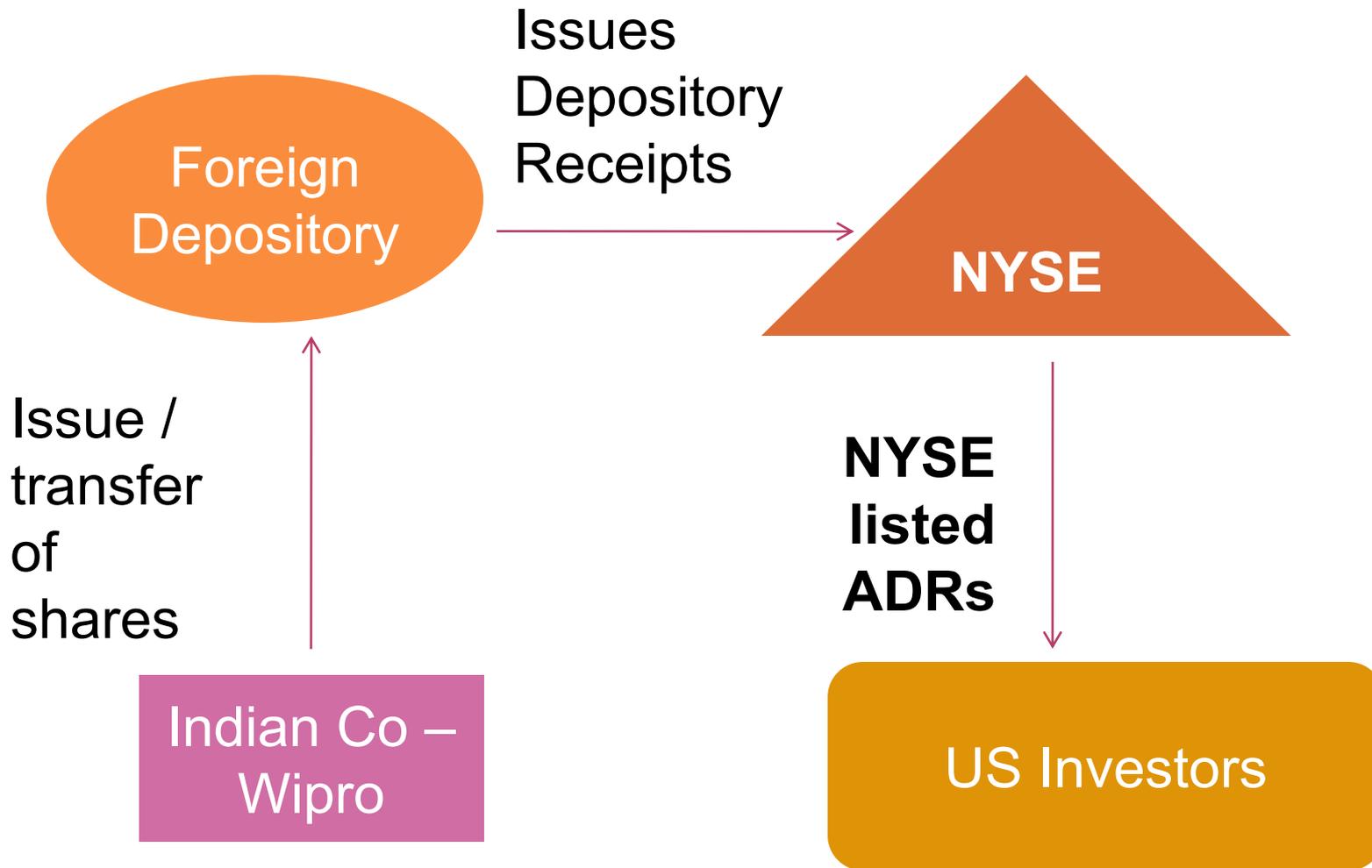
# Sch. 10 : IDRs

- IDR: Foreign Companies can issue Indian listed Indian Depository Receipts to Indian residents
  - Enables Indian Rs to own Foreign Shares
  - E.g. **Standard Chartered Plc** has issued IDRs listed in India
  - IDRs denominated in INR only
  - If financial / banking presence in India by branches then requires prior approval of RBI
  - Proceeds of IDR issue must be repatriated by the Issuer Company

# Sch. 7: IDRs

- NRIs and RFPIs can purchase IDRs
  - On repatriation basis
  - 2-way fungibility possible
  - Redemption into shares only after 1 year lock-in

# ADR / GDR



# ADR / GDR

- Foreign Currency denominated Instrument
  - May be listed – if issued in US (NYSE / NASDAQ) – ADR;
  - if in Europe / Others– GDR (LSE, Luxembourg, Singapore)
- Backed up by Eligible Instruments issued to Foreign Depository & held by Custodian ~ Shs / Deb. but in Demat
- NR must be eligible to invest in Shs / Deb under TISPRO
- Depository Receipts Scheme, 2014 – governing law
- Any Indian Co. (Listed / Pvt.) can issue DRs
  - Good avenue for E-commerce Companies –
    - 13 ADR Issues & about 110 GDR Issues
- Can be Public Issue or Private Placement
- 34 permissible jurisdictions

# ADR / GDR

- Price of Eligible Securities issued to Depository cannot be lower than price for issue of such securities in India
  - E.g., Listed Co. can't issue DR shares lower than SEBI Preferential Issue Pricing under SEBI ICDR Regs
- Underlying Shares for DRs is part of Public Shareholding
- Compliance Obligations on Domestic Custodian
- No End-use restrictions but FEMA TISPRO Regulations
- Eg HDFC Bank raised Rs. 12,000 cr through ADR-issue

# Sch.9: ADR / GDR Conversion

- Conversion of Shares into DRs
  - Foreign Investors can transfer shares /CDs in ICo to Foreign Depository and receive DRs
  - Domestic Custodian can purchase Indian Shares on behalf of Foreign Investor and convert them into DRs
  - Total  $\leq$  Foreign Investment limit under FEMA Regs.
  - Price of DRs not less than Price at which shares would have to be issued to Domestic Investors under applicable Laws

# NCD by FPIs

# NCDs to FPIs

- FPI can invest on Repatriation Basis
  - Listed NCDs with Interest / Premium
  - **Indian Co. can pay Fixed / Guaranteed Returns** through Interest and / or Redemption Premium
    - Can link Returns to Earn-out / Cash flow / Underlying Share Valuation / Profits of Investee Co. / CAGR / IRR
  - Full Repatriation allowed
  - Rating Agency required
  - Even Private Limited Co. can issue Listed NCDs

# NCDs to FPIs

- FPIs up to **Rs. 3.03 lakh cr.** on tap ceiling & FVCIs no ceiling at all
  - Countrywide Aggregate Limit for all NCDs for all FPIs
- As of Apr 30<sup>th</sup>, Rs.2.10 lakh cr. or **69%** of the Corporate Bonds' Limit of Rs.3.03 lakh cr. was used by FPIs
  - Rs. 92,520 cr. yet available for Investment on the tap
  - Once exhausted no fresh bond issuance can take place until the Government increases the ceilings

# NCDs to FPIs

- Minimum Maturity of 3 Years but FPI can sell domestically before that also
  - Can invest in Maturity of 1 Yr also but this cannot exceed 20% of total Invst. of that FPI in that Category
- **No Sector Restrictions**
- **No ECB Restrictions**— All-in-cost, Sectors, End-use, Type of Lender
- Need not be compulsorily convertible like CCDs
- FPI can even purchase Listed NCDs from Market

# NCDs to FPIs

- FPI Investment in Unlisted NCDs
- **Not for On-lending, RE Activities, Capital market, Land acqn**
  - RE Activities – even construction not allowed? Should be RE Business like under FDI Regs.
- All other sectors permissible for Investment
- Minimum 3 Years Average Maturity
- Must be in Demat only

# FVCI

# Sch. 7: Investment by FVCI

- FVCI = SEBI Registered
  - Invst. Co / AMC / Invst. Manager / Invst. Vehicle
  - Tax Payer or Track Record from Banker
- SEBI Registration criteria
  - Status ~ Invst Co / Pension or Mutual Fund / Endowment Fund / Charitable Entity / Investment Trust?
  - AMC / Investment Manager is abroad
  - Whether Regulated by Foreign Regulator or Track Record by banker or an Income-tax Payer?
  - Whether Fit and Proper Person?
  - FVCI can also act as FPI – Portfolio segregation

# Sch. 7: Investment by FVCI

- Firm Commitment from Investors of at least \$1 million
  - Financial Statements to be furnished of all Investors who have given Firm Commitment Letters
  - Investment:
    - Min. 66% of its Funds in Equity / Eq-linked Investments of VCU
      - **VCU: Unlisted and not NBFC /CIC/ Gold Financing /**
    - Max 33% of its Funds in Debt of Co. in which Eq Investment made / IPO of VCU / Preferential Allotment by Listed Co
      - No min. limit of equity required unlike in ECB
    - Can also invest entire funds in a single AIF Cat-I being a VCF

# Sch. 7: Investment by FVCI

- Can Invest in OCPS / RPS / OCDs / Unlisted NCD / Listed Debt of the VCU
- No pricing requirements at time of investment
- Sch. 7 FVCI separate from FDI
  - Don't file FC-GPR else treated as FDI under Sch. 1
- Sectors open for FVCI
  - Only **10** specified sectors – Biotech / IT/ Nanotech / Seed R&D / Pharma R&D / Dairy / Poultry / Bio-fuels/ Hotel / Infrastructure ~
  - Energy /Telecom/ Transport/Water/Hospitals/Schools/ Mining / Cold Chain / Soil testing / **Affordable Housing**

# Sch. 7: Investment by FVCI

- Sectors open for FVCI
  - **Start-ups** – No Sectoral restriction
    - Only Private Companies
    - Recognised by DIPP

# Sch. 7: Investment by FVCI

- Can have assured Pricing / Guaranteed Returns at Exit
- No RBI approval required for making Investments
  - Earlier required
- Can have Resident \$ or INR Account in India
- Can transfer Investments to R / NR at mutually acceptable price
  - No Pricing Guidelines
  - No FC-TRS to be filed
- Like RFPI can invest in Listed NCDs
  - But within 33% of its funds & of VCU in which already invested

# Qualified Institutional Placement

- Only for Listed Companies – separate SEBI Regs.
  - Pvt. Placement to QIBs
  - Global QIBs: FPI Cat I /II, FVCI
    - If to FPI, then treated as Portfolio Invst. – Sch 2A of TISPRO
    - If to FVCI then Issue to FVCI – Sch. 7 of TISPRO
  - Placement Document & Merchant Banker required
  - Pricing: Avg. Weekly H/L of Closing Prices during 2 weeks preceding Board Resolution approving QIP
  - Min. 2 allottees if QIP ≤ 250 cr. else 5
  - All QIPs put together ≤ 5 times Networth of Last Audited B/S

# Qualified Institutional Placement

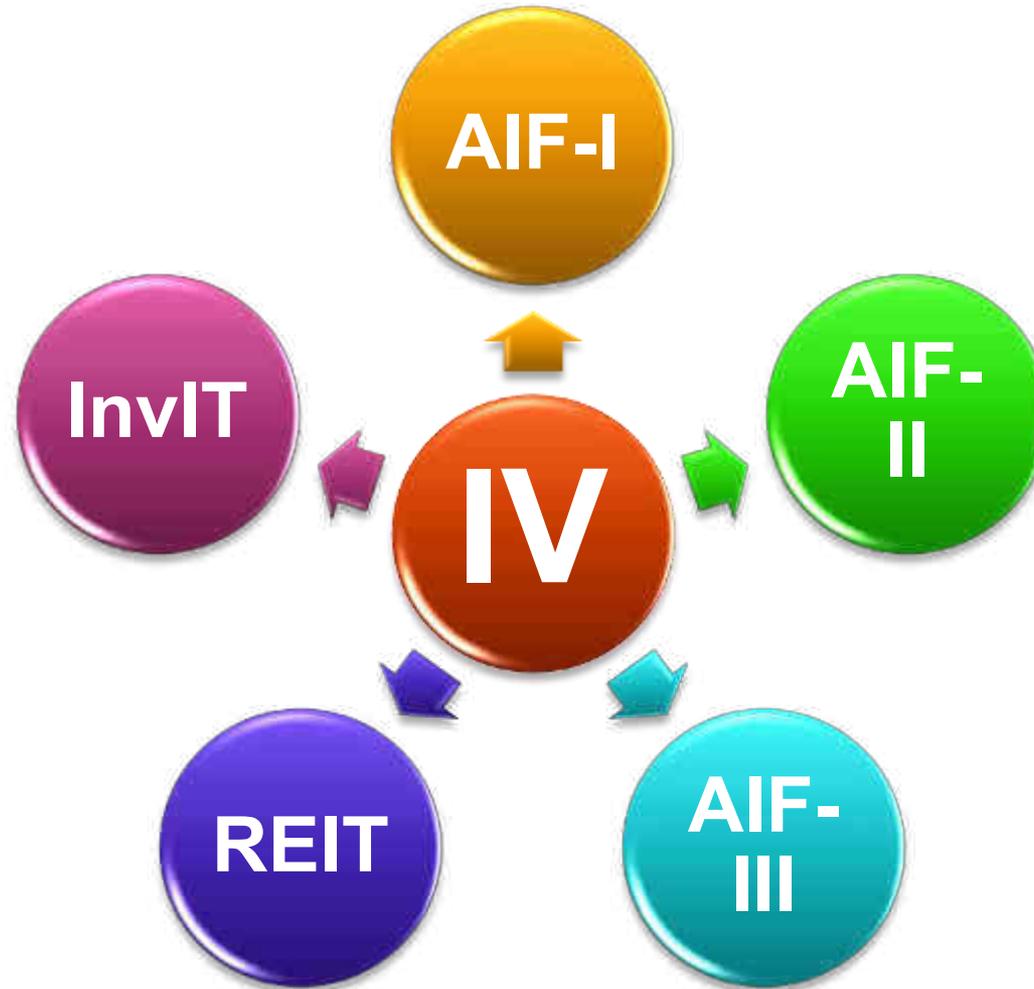
- Only for Listed Companies – separate SEBI Regs.
  - Can even issue Convertible Securities, such as, CCDs /CCPS
  - Convertible Sec. under QIP must be converted within 60 mts
  - E.g.,
    - **JM Financial Ltd raised Rs. 650 cr. by a QIP issue in Jan 2018 which included issues to Cat I FPI and Cat II FPI**

# FDI v FVCI v FPI NCD

Factor	FDI	FVCI	FPI – NCD
<b>Sector Restrictions</b>	Yes & Caps	Yes (10) except for S/up	Not for Listed NCDs
<b>Instrument</b>	Equity / CCPS / CCD/Warrants	Equity / Unlisted Debt / Listed NCDs	NCDs
<b>Listing a must</b>	No	No	No
<b>Cap on Interest</b>	Now deleted	No	No
<b>Pricing</b>	FMV	Open	Open
<b>Security</b>	No	Yes if Debentures	Possible
<b>Tax Benefit</b>	Only in CCD Interest	Yes in Interest / Premium	Yes. Interest / Premium
<b>Exit Route</b>	Buyback / Sale	Buyback/ Sale / Redemption	Redemption / Sale
<b>Assured Returns</b>	NO	<b>YES</b>	<b>YES</b>

# Investment Vehicle

# Sch.8: Investment Vehicle



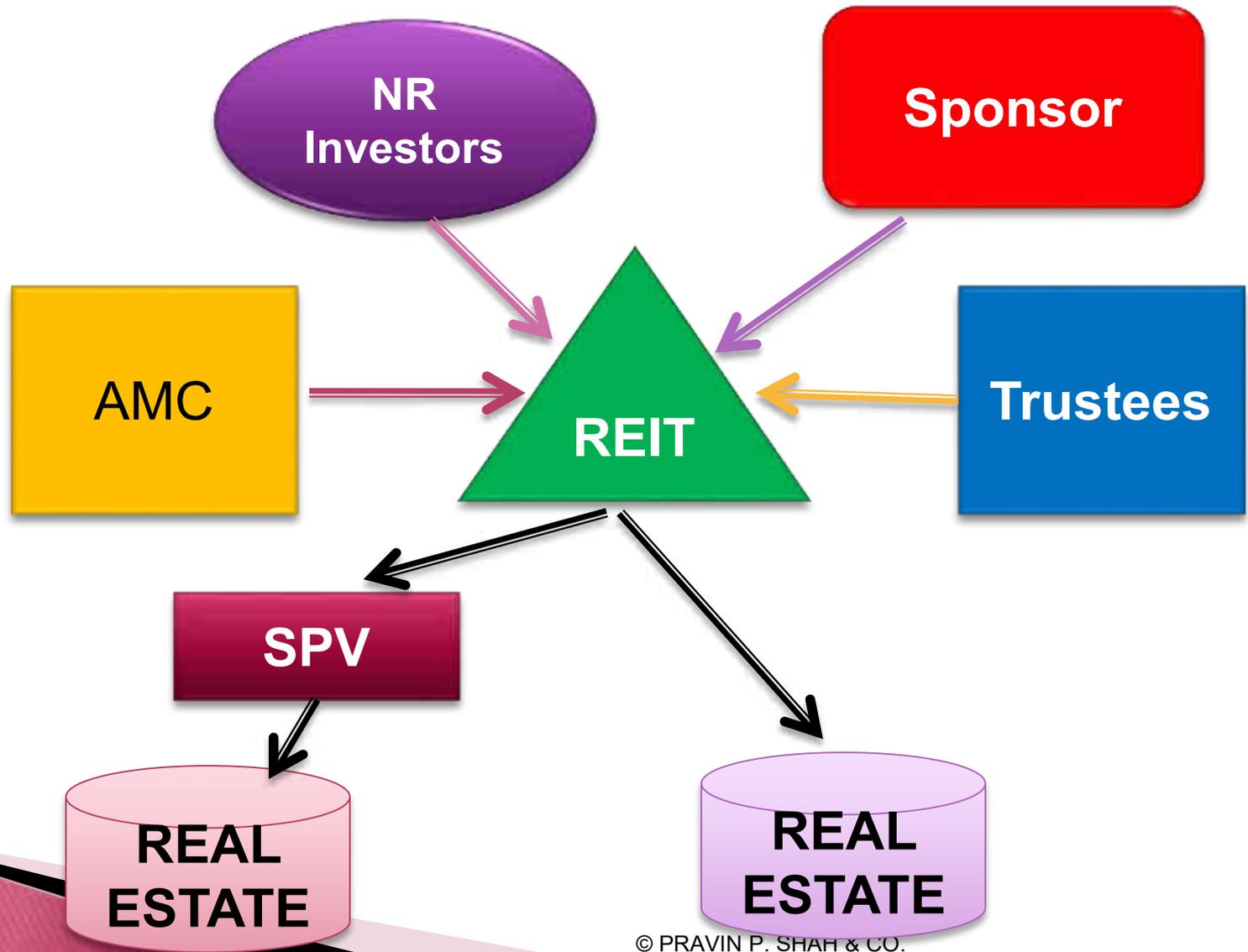
# Sch.8: Investment Vehicle

- IV is an **Indian Vehicle** which makes Investments in Indian Companies
  - IV must be Registered with and Regulated by the SEBI or any other Authority under its applicable Regulations
    - IV must be an Indian entity
  - NRs would invest in Units of IV which would actually invest in shares / securities of Portfolio Companies / SPVs

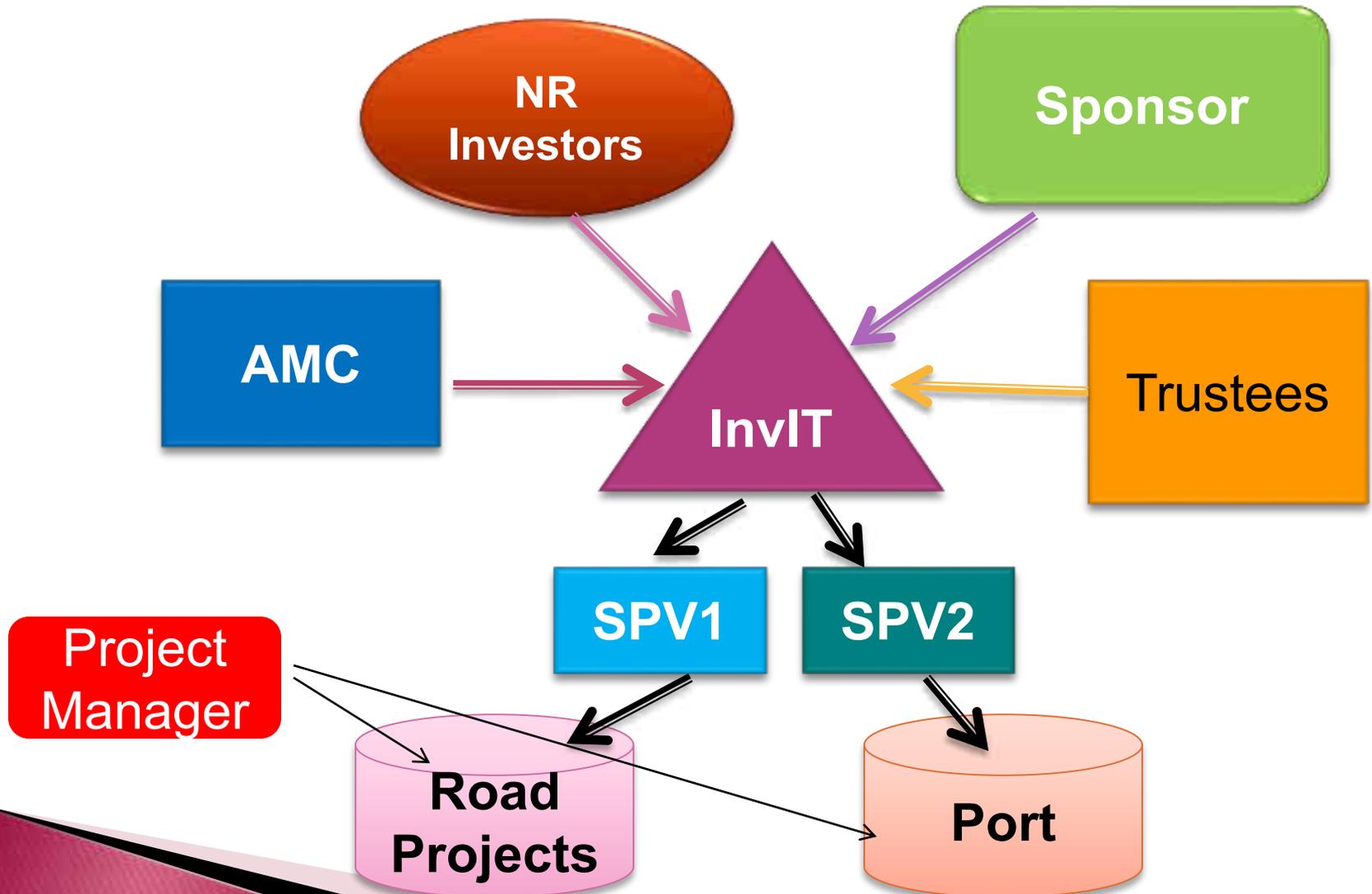
# Sch.8: Investment Vehicle

- Eligible Investors who can invest in IV units:
  - Any PROI ~ Non-Pakistani / Bangladeshi
  - RFPI
  - NRI
  - FVCIs ~ But only in Cat I AIF
- Investment terms:
  - Payment from abroad or NRE / FCNR A/c
  - Investor Can sell / transfer / redeem such units
    - Subject to relevant SEBI restrictions
  - Investment is on repatriable basis

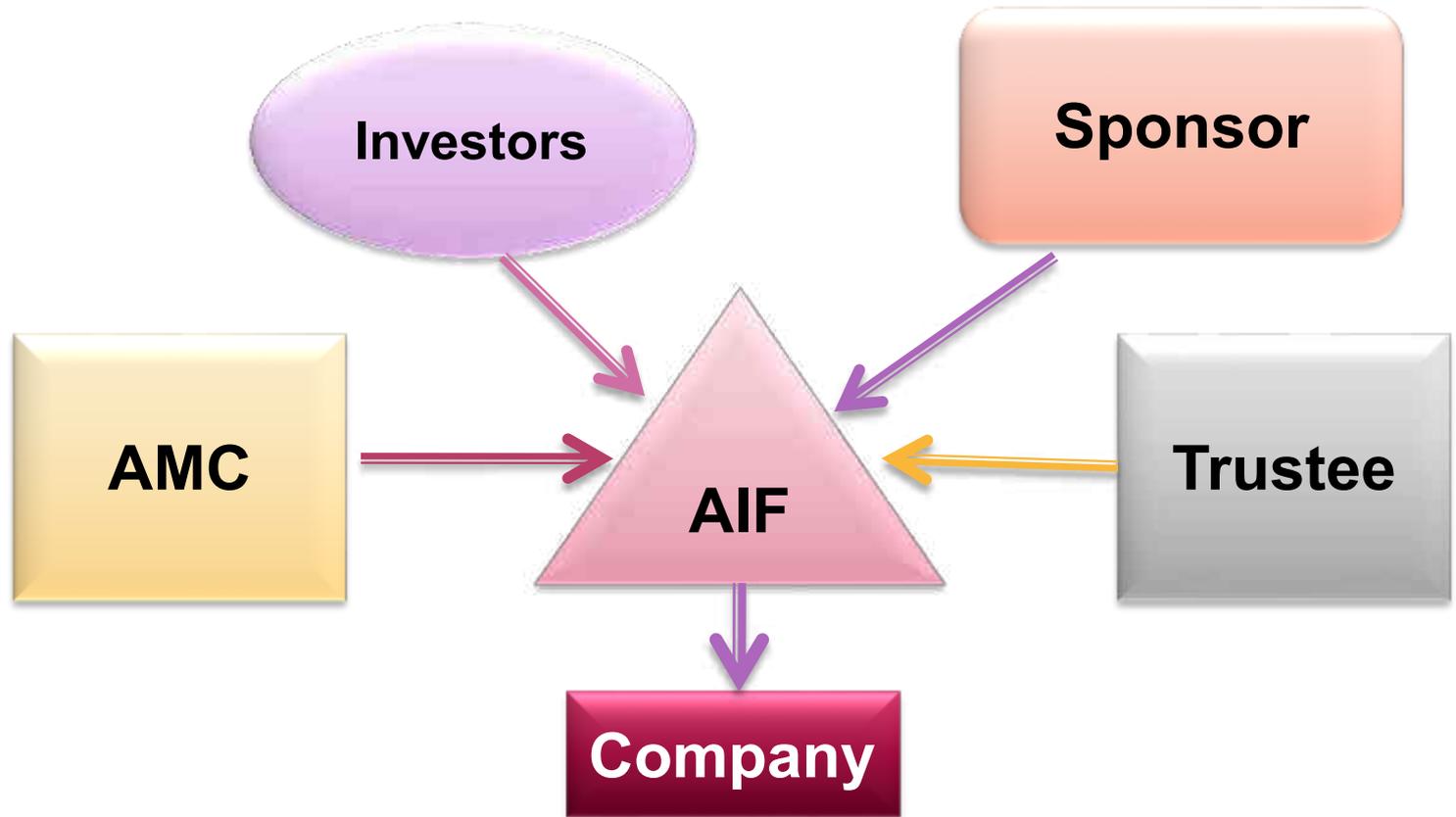
# Real Estate Investment Trust



# Infrastructure Investment Trust



# Alternative Investment Funds



# Categories of AIF

Particulars	AIF-I	AIF-II	AIF-III
Types	VCF / SME / Social Venture / Infra Funds	Private Equity / Debt Funds	Hedge Funds
Borrowing Allowed	No	Temporary funding $\leq$ 30 days; 10% of Corpus + 4 times / Year	Yes subject to a maximum limit to be specified by SEBI
Investment	VCU /Cos / LLP – 2/3 in Eq. / Eq.-linked & Max 1/3 in Debt, QIP, IPO of VCU	Unlisted Cos. / Units of AIF-I / II	Listed / Unlisted Securities / Derivatives / Structured Products / Units of AIF-I / II
Max Investment in 1 Co.	25% of Corpus	25% of Corpus	10% of Corpus

# Sch.8: Investment Vehicle

- ▶ Downstream Investment by IV
  - Investment in Portfolio Companies by IVs with For Invest. is treated as Domestic Invst. as long as:
    - Sponsor and AMC are both Indian O & C
      - Co Ownership: 50% + of capital held by resident Indian Citizens
      - Co Control: Right to appoint majority of BoD / control the management by SHA / SSA with resident Indian citizens
      - LLP: 50%+ of Invst is by R Indian Citizens
    - If Sponsor and / or AMC are Individuals then they must be resident Indian citizens

# Sch.8: Investment Vehicle

- Sponsor and AMC are both Indian O & C
  - LLP Ownership: 50% + of Investment in LLP contributed by Resident Indian Citizens or entities ultimately O&C by R Indian Citizens
  - LLP Control: Right to appoint majority of DPs where such DPs alone have control over all the policies of the LLP.
- Control solely dependent upon the status of Sponsor / AMC
- Entity other than Co / LLP – SEBI to prescribe manner of determining its O&C

# Sch.8: Investment Vehicle

- ▶ Downstream Investment by IV
  - Extent of Foreign Investment in IV's corpus per se (e.g., AIF) irrelevant to ascertain whether it is Foreign or Resident
    - AIF can float an entire scheme dedicated to NRIs and yet remain Domestic as long as Sponsor / AMC is O&C by Indians
    - E.g., India Opportunities Fund (AIF-II) launched for RE
      - Manager, Sponsor, Trustee all O&C by Indian citizens
      - Fund contributors all PROI
      - Yet investment by AIF-II in RE treated as Domestic Investment
        - Can invest in RE Business / TDRs trading, Defence, Multi-brand.

# Sch.8: Investment Vehicle

- ▶ Downstream Investment by IV
  - AIF set up or AMC owned by Indian Financial Institution, like HDFC which has over 75% Foreign Shareholding
    - Investment by such AIF Treated as Foreign since ultimate Ownership of Sponsor / AMC not with Resident Indians
  - But if AIF set up or AMC owned 51% by Indian Residents and 49% directly owned by Foreign Investors
    - Investment by such AIF treated as Domestic since ultimate Ownership of Sponsor AMC is with Resident Indians

# Sch.8: Investment Vehicle

- If even any one of Sponsor or AMC is O&C by NRs then entire Downstream Investment by IV treated as Foreign
  - If treated as Foreign, then Investment in Portfolio Companies must conform to restrictions / sectoral caps, pricing / valuation, reporting norms applicable to FDI under Sch.1
  - If treated as Foreign, then Investment in Portfolio LLPs must conform to restrictions applicable to LLPs under Sch.9
  - In earlier E.g., if AMC was O&C by NRs then investment in RE Business / TDR trading not permissible

# Sch.8: Investment Vehicle

- AIF Cat-III (Hedge Fund) with Foreign Investment
  - Can Invest in only such Portfolio Securities as are available to a RFPI under Sch. 2 / 5
  - Restricted List for RFPIs
    - NCDs with Maturity of less than 3 years

# Transfer of Shares to PROI

Seller	Buyer	Auto Route	Remarks
PROI other than NRI / OCI	Any PROI	Sale / Gift No Pricing G/L	If FPI buys > 10% then must divest excess
NRI / OCI	Any PROI	Sale / Gift No Pricing G/L Now RBI not reqd.	If NRI buys > 5% then must divest excess
R or NRI on NR	Any PROI	Sale Pricing G/L	NA if Buyer is NR NRI under Sch. 4
R	Any PROI	Gift – RBI Approval	5% Capital Limit To relatives only Value <\$50,000
NRI on NR basis	Any NRI on NR basis	Sale / Gift No Pricing G/L	

# Transfer of Shares to PROI

- Pricing Guidelines
  - Price worked out as per relevant SEBI G/L
    - Buyback / Delisting / Takeover
  - Unlisted Co. ~ Internationally Accepted Pricing Method
    - ALP Basis
    - As per CA / MB
- FC-TRS filed with AD
  - Within 60 days of Transfer

# Transfer of Downstream Invest

- ▶ Shares / CCDs of Indian Co. which is not O&C by Indian Citizens can be transferred to
  - **PROI**
    - No Pricing Guidelines
    - But reporting in FC-TRS
  - **PRII**
    - No reporting
    - But comply with Pricing Guidelines
  - **Indian Co. with FI + Co is O& C by NRs**
    - No Pricing
    - No Reporting

# Conclusion

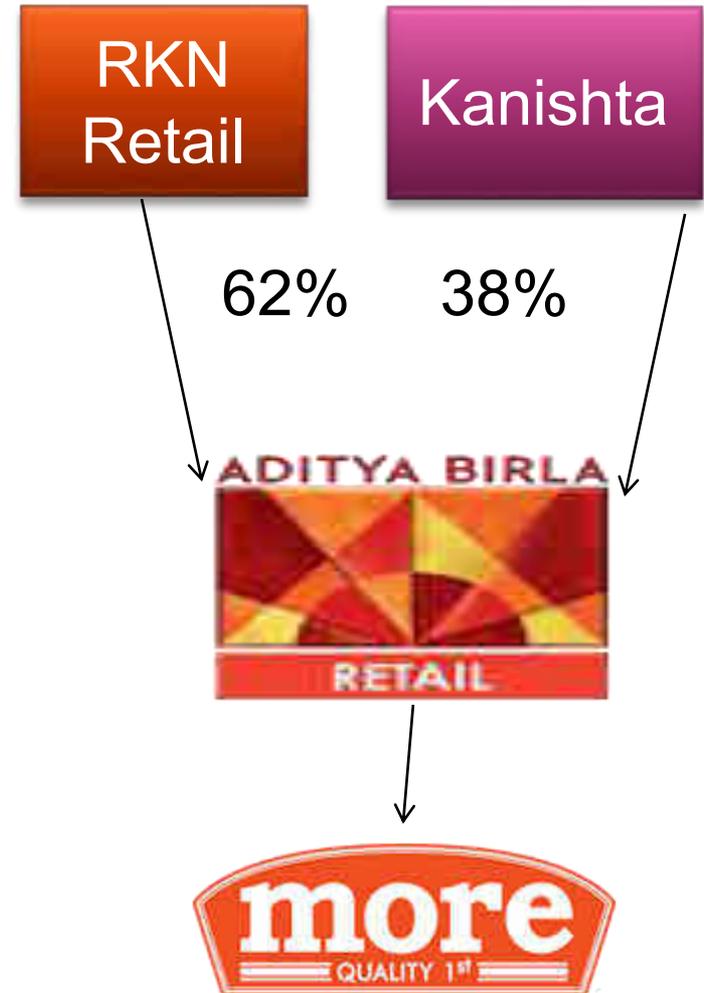
# Sch.1 Caps Not Applicable

Restricted Sectors / Sectoral Caps / FDI Conditions not applicable to the following:

Investment	Unlisted Cos.	Listed Cos.
NRIs on Non-repatriable basis	Domestic – no limits	Domestic – no limits
Repatriable PIS by RFPI	NA	No limits with Spl. Resln.
Repatriable PIS by NRIs	NA	24% limit with Spl. Resln.
Indirect Foreign Investment via AIFs provided AIF's Control is with Indians	Domestic – no limits	Domestic – no limits (if Cat II or Cat III)
FVCI on repatriable basis	No limits but only in restricted sectors	×

# Case Study: More for Amazon

- ▶ “**More**” Multi-Brand Retail Trading Outlets
  - 575 Supermarkets + Hypermarkets
  - 4<sup>th</sup> Largest Indian Retail Chain
  - Owned 100% by Aditya Birla Retail Ltd (**ABRL**)
  - ABRL, in turn, owned by 2 Private Ltd Cos. of Birla Group



# Case Study

- ▶ Amazon wanted to acquire More
  - Offline presence with online store
  - FDI up to 51% allowed in MBRT on Govt Approval
  - FDI up to 100% on Wholesale Cash & Carry Business on Auto Route
  - State Govt. approvals needed for MBRT

# Case Study

- Structure Adopted
  - Witzig, an existing Facility Management Back-end Firm used
  - Amazon invested 49% in Witzig while balance
  - 51% owned by Samara Capital, an AIF
    - AMC / Sponsor / IM entirely controlled and managed by Indian Citizens - ∴ IV treated as O&C by Indians
    - Corpus held by some US Family Offices
    - ∴ Investment by Samara treated as Domestic Investment
  - Witzig acquired 100% Shares of ABRL

# Case Study

amazon

Samara,  
AIF

RKN  
Retail

Kanishta

49% 51%

Witzig

Sale of  
100% stake  
in ABRL for  
Rs. 4200 cr.



# Case Study

- Samara Owned and Controlled by Indians
  - So 51% in Witzig is O & C by Indians
  - So Witzig is a Domestic Company
  - Downstream Investment in ABRL is Not Indirect FDI
  - Will not require approval of State Government for MBRT FDI
  - Amazon can adopt the same model for buying out other MBRT Outlets

# Case Study: Final Structure

amazon

Samara,  
AIF

O&C by Res  
Indians

49% 51%

Witzig

O&C by Res Indians

100%



**THANK YOU!**

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