Foreign Investment (Other than FDI)

Intensive FEMA Course

- Dr. Anup P. Shah
Chartered Accountant

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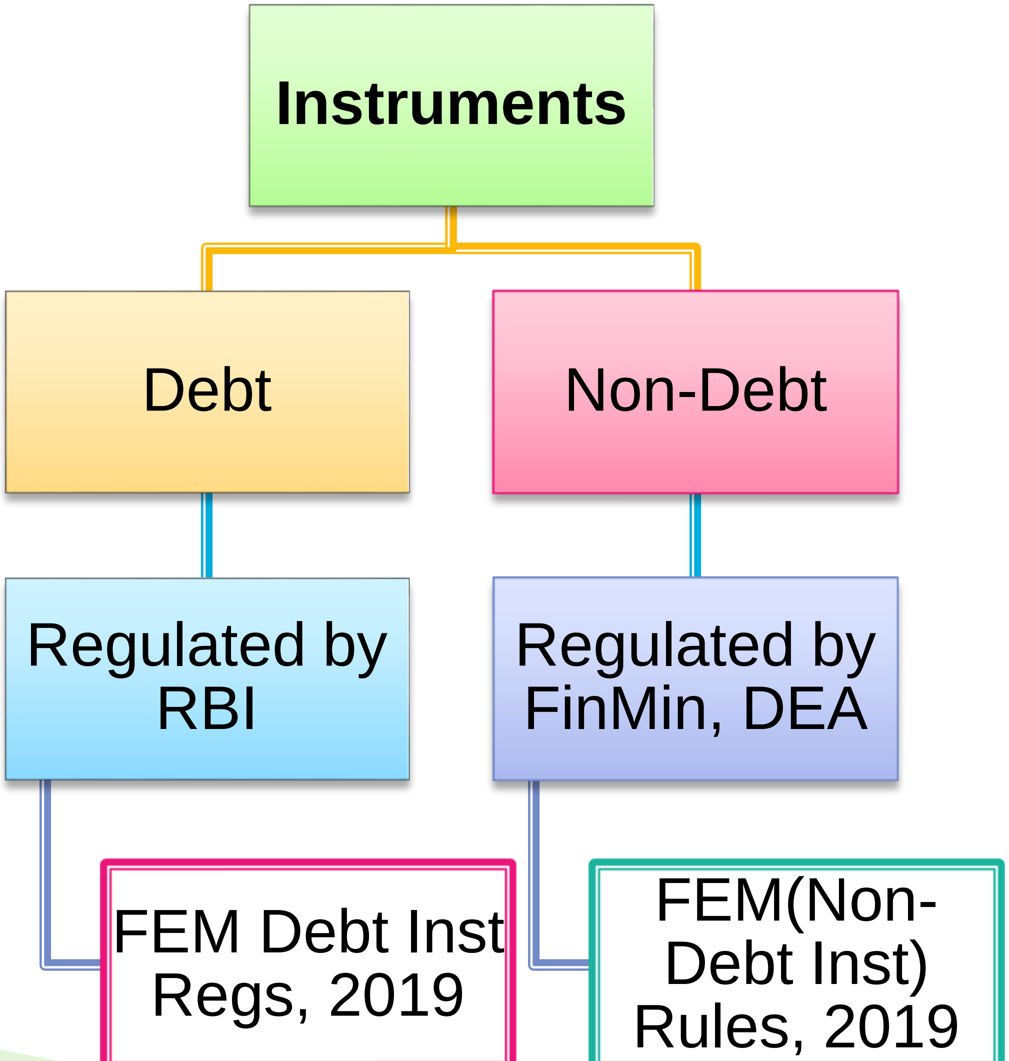
THE CHAMBER OF TAX CONSULTANTS

New Classification in FEMA



Bifurcation by Fin MIn

- Eq / CCD / CCPs in all types of Cos
- Capital in LLP
- Units of InVIT / REIT / AIF + MFs with more than 50% in Equity
- DRs issued against Equity Instruments

Non-Debt Instruments

- Govt Bonds
- Corp Bonds
- SRs
- Loans
- DRs with underlying Debt Securities
- Units of MFs with less than 50% in Equity

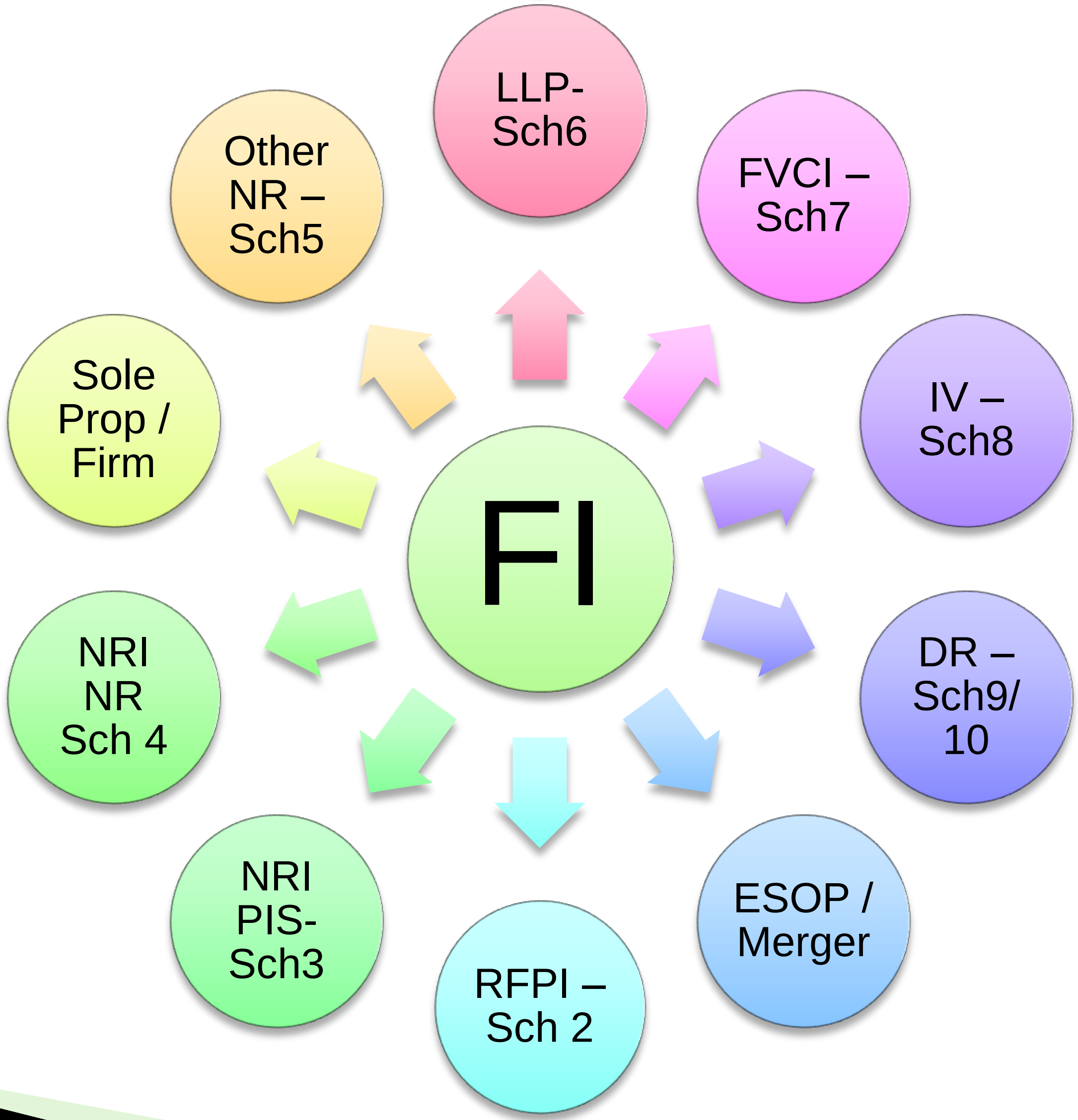
Debt Instruments

Foreign Investment in NDRI

NDI Foreign Investment – FEMA NDI Rules

- **FDI**
  R.6 r.w. Sch. 1
- **Share Transfer**
  R. 9 + Other Rules
- **Other FI**
  R.7, 8,19 + Sch. 2-10

Other NDI Foreign Investment



Merger & ESOPs

ESOPs

- 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

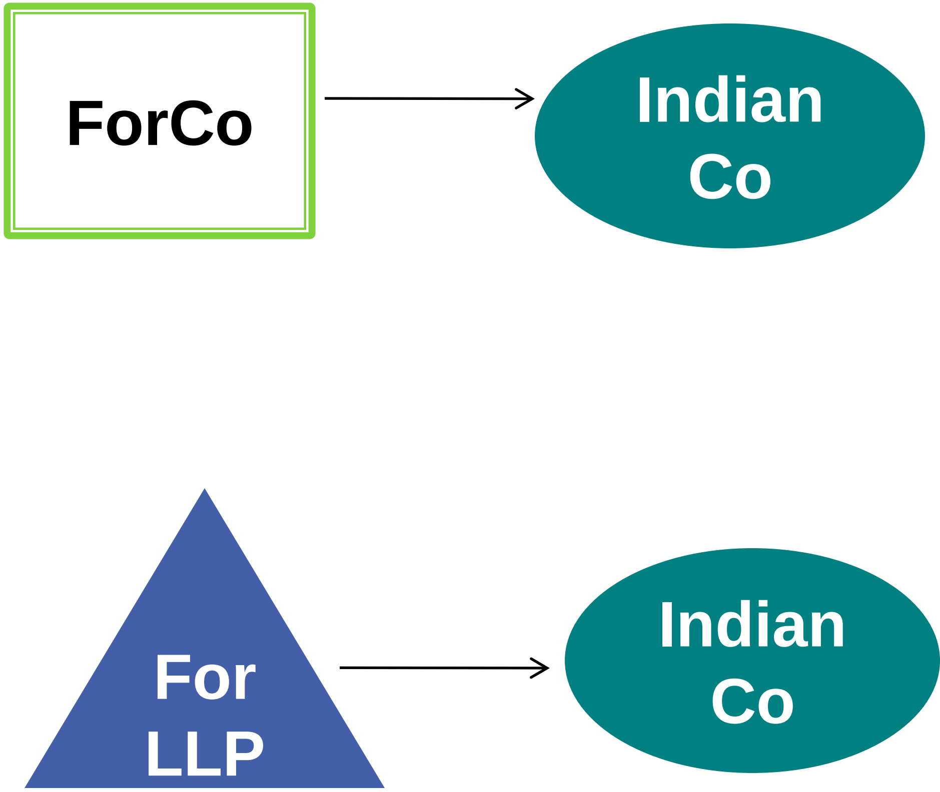
- Indian Cos. can issue shares to NR Shareholders of:
  - Indian Transferor companies in a Scheme of Merger / Demerger / Reconstruction
    - % of NR shareholding in Transferee within Sectoral Caps or as per CG approval, if any
    - Issue – Compliance with Entry Routes / Investment Limits
    - Transferor / 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

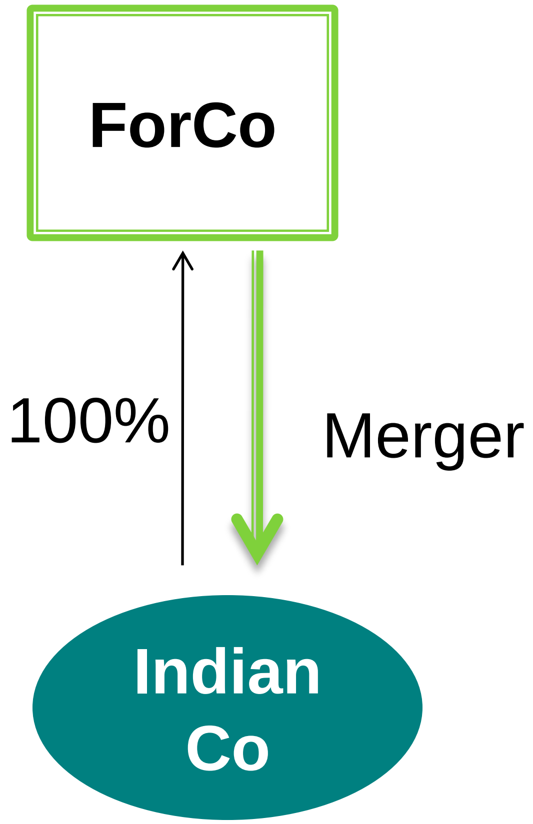
Foreign Mergers

- **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 – Part of Debt Regs

- 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 / InvIts
  - 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**!**

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
    - **But Not Foreign LLP O & C by NRIs?**
  - What is O & C by NRIs?
    - No definition in Sch. 4 so Refer to Rules
    - 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
  - 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 ~ 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. What is Performance Linked Conditions?
    - **Sector specific conditions in reg. 16 of FEMA TISPRO**
    - **Guidelines for Cash & Carry WT be treated as PLC?**
    - **Guidelines for SBRT be treated as PLC?**
    - Sourcing Requirements from India

Q NBFC, Housing, Trading not possible?

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
  - Subject to compliance of LLP Act, 2008.
  - Pricing:
    - Capital Contribution ≥ 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 ≥ 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
- 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
    - 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 FDI & Foreign Portfolio Investment
- Linked to % of FI/ Type of Investee – Listed / Unlisted
- FEM (NDI) Rules have tweaked the definition of Listed Co. vs TISPRO Regegs
  - Listed Co ~ Co. whose Equity or Debt Instruments are Listed

    ∴ **Private Co**. whose **NCDs listed** would also be treated as **Listed**

    - Under TISPRO only Equity Listed was treated as Listed Co.

    ∴ Now Less than 10% in Pvt Co. whose NCDs listed treated as Foreign Portfolio Invst. – strange!

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
  - 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

Sch.2: PIS by RFPI

- FPI Regime – Registered Foreign Portfolio Investor
  - Must be registered with SEBI – 3yrs Regn at a time
  - Earlier 3 Categories subsumed into 2
  - **Cat I FPI**: Sovereign Wealth Funds / Govt. / Central banks
  - **Cat II FPI**: University Funds / Mutual Funds / Banks / Portfolio Managers / Corporate Bodies, Trusts, Family Offices / Individuals ~ NRIs can now be members of FPI
  - Entities set up in GIFT City can register as FPIs

Sch.2: PIS by RFPI

- Can Invest in Listed Shares / Shares to be Listed (New)
  - Pursuant to IPO / FPO / Rights / Mergers / Pvt Placements
- **Before Mar 2020** ~ Holding/ RFPI ≤ 10% & Total ≤ 24% of Capital
  - 24% can be ↑ 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
- **From Apr 2020** ~Limits would be the Sectoral Caps
  - If in Sector where FDI prohibited then Limit is fixed at **24%**
  - Co. can decrease Limits to 24% / 49% /74% by Spl Resl > Mar 2020
  - Limits decreased can be Increased to 49%/ 74% / Sectoral Caps
  - However, Limits once so Increased cannot again be decreased

Sch.2: PIS by RFPI

- FPIs which are Banks / AMCs/Insurance, etc. can buy on behalf of their clients as Cat II FPIs + prop trading as Cat I FPIs
  - Clients can be Indvd & Family Offices
- Must buy & sell on Delivery basis on Market only ~ Cannot Short Sell Securities except through SLBM
  - Can participate in Buyback / Takeover / Delisting offers or selling Rights entitlements

Sch.2: PIS by RFPI

- If FPI breaches the limits
    - Can divest within 5 days from settlement causing breach
    - Else, entire investment becomes FDI & FPI can’t make further FPI
- Can invest in Private Plcmt of securities under PIS Route
- Can buy InvIts / REITs / AIF Cat III
- However Pre-IPO placement to FPI treated as FDI
    - Required to follow FDI Conditions
        - E.g., Pre-IPO placement to FIIs 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

- 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	72%
Future Lifestyle	Multi-brand Retail	22%
DLF	Real Estate	16%
Delta Corp	Gambling	20%
Interglobe Aviation	Aviation	15%
HT Media	Print Media	7%

Sch.3: PIS by NRIs

- NRIs can purchase Shares on PIS On repatriation basis
  - Paid-up value of Shares / CDs / Warrants ≤ 5% per NRI
  - Aggregate shares / CDs / Warrants by all NRIs ≤ 10%
    - Can ↑ to 24% by passing Spl. Resln.
  - Delivery based buying / selling
  - Not in Agr Co / RE Biz / Farm House / Nidhi / TDR tarding
  - 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. 5 : Investments by Other NRs

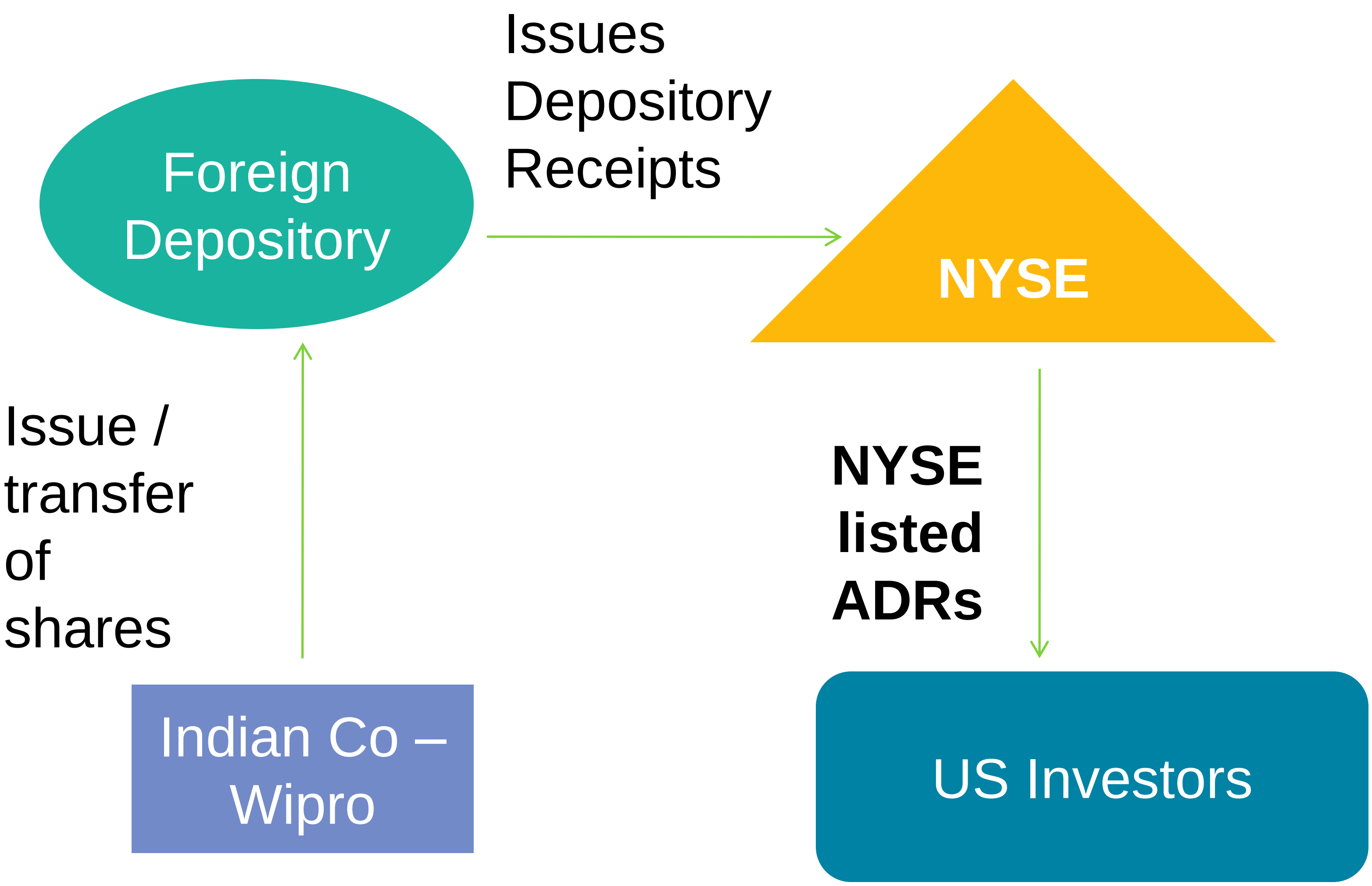
- Long-term Investors can invest in securities based on conditions specified by SEBI and RBI
  - SWFs, Endowment Funds, Pension Funds / Insurance Funds
  - Foreign Central Banks

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.9: ADR / GDR



Issues Depository Receipts
Foreign Depository
NYSE
Issue / transfer of shares
NYSE listed ADRs
Indian Co – Wipro
US Investors

Sch. 9 : 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 by Eligible Insts. issued to Depository & held by Custodian
- 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

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. 3.17 lakh cr.** on tap ceiling & FVCIs no ceiling at all
  - Countrywide Aggregate Limit for all NCDs for all FPIs
- As of Dec 9th 2019, Rs.1.91 lakh cr. or **60%** of the Corporate Bonds' Limit was used by FPIs
  - Rs. 1.26 lakh 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 /
  - 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

- 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

Sch. 7: Investment by FVCI

- Sectors open for FVCI
  - **Start-ups** – No Sectoral restriction but Recognised by DIPP
- Can have assured Pricing / Guaranteed Returns at Exit
- 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 2
    - If to FVCI then Issue to FVCI – Sch. 7
  - 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

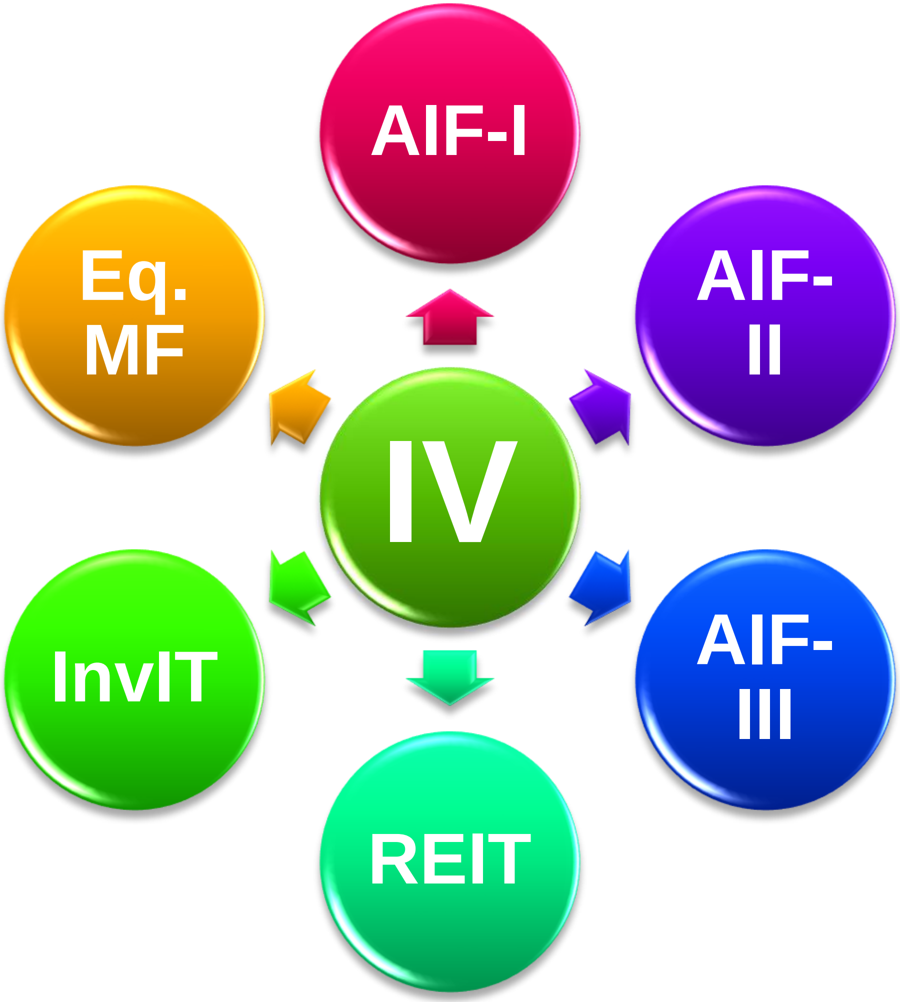
- Only for Listed Companies – separate SEBI Regs.
  - Can even issue Convertible Securities, such as, CCDs /CCPS
  - Convertible Sec. under QIP must be converted within 60 mts
  - E.g.,
    - **JM Financial Ltd raised Rs. 650 cr. by a QIP issue in Jan 2018 which included issues to Cat I FPI and Cat II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

FDI v FVCI v FPI NCD

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

Investment Vehicle

Sch.8: Investment Vehicle



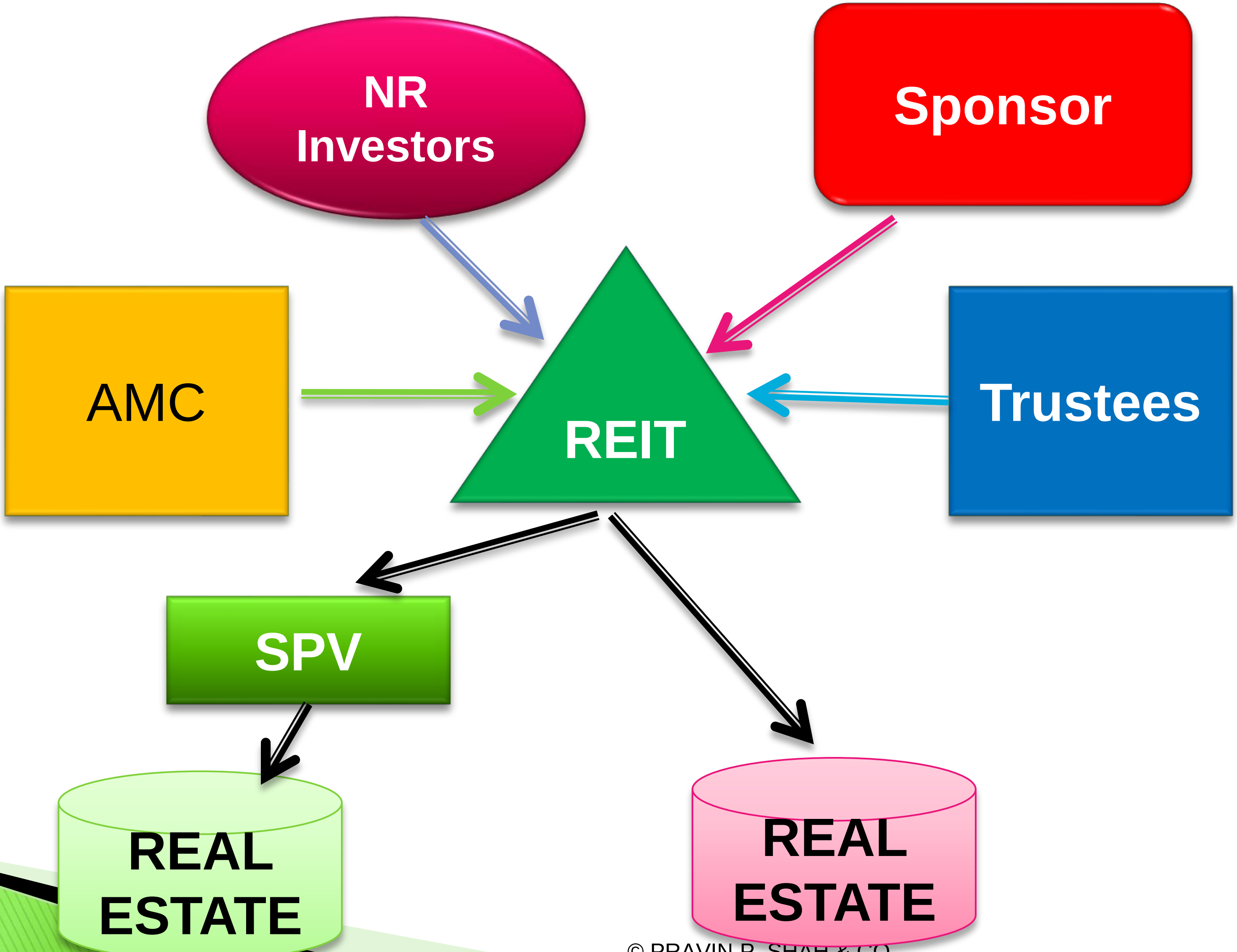
Sch.8: Investment Vehicle

- 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

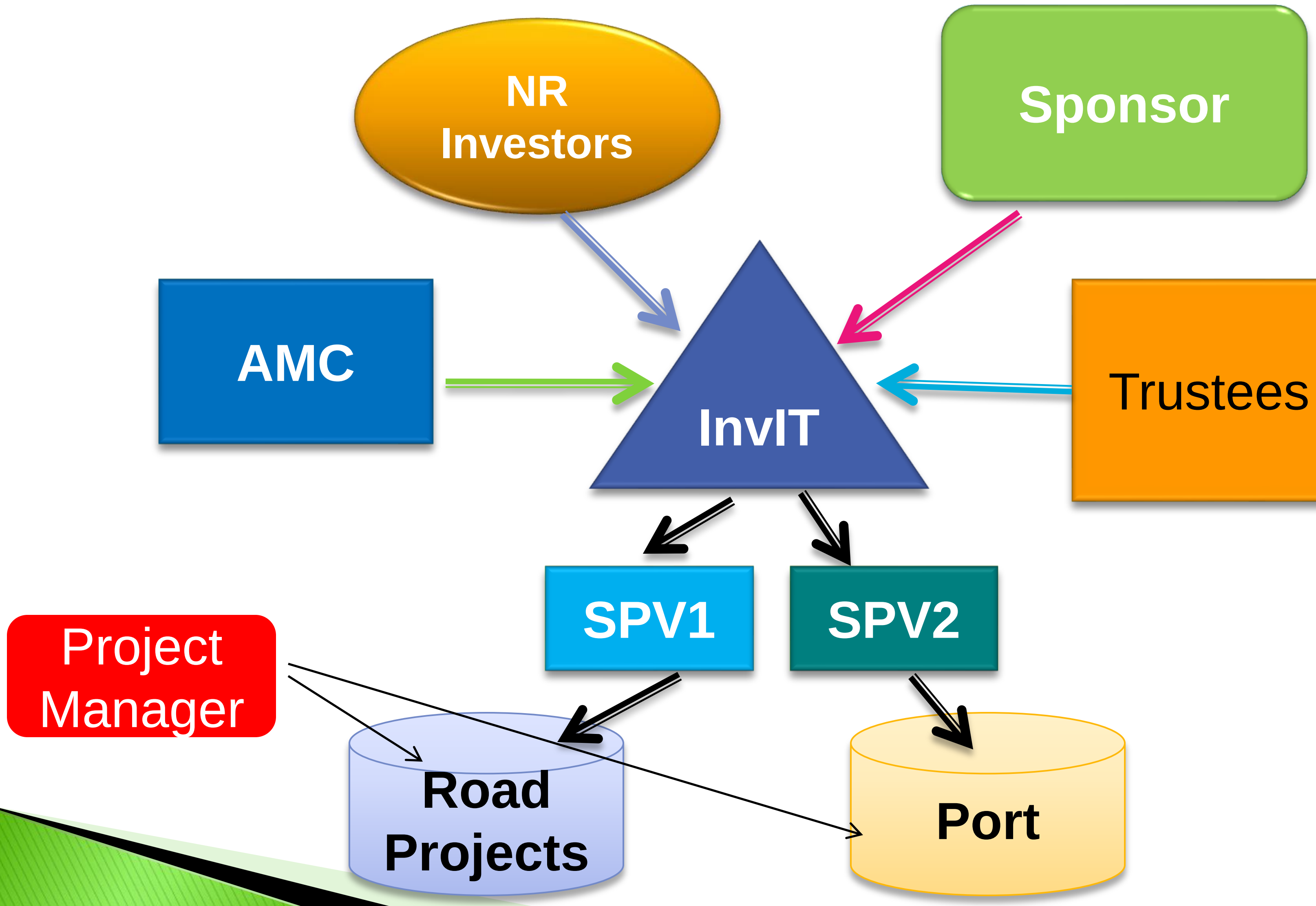
Real Estate Investment Trust



REIT Example

- Embassy Office Parks REIT
  - Blackstone –Embassy JV is the Sponsor and has contributed its Rental Portfolio to this REIT
  - About 33 m. sq. feet of Office Space of Business Parks / Hotels spread-across 4 cities
  - Over 55% of Promoter is Foreign (Blackstone) & 15% of Public is Foreign = Total 70% is Foreign held

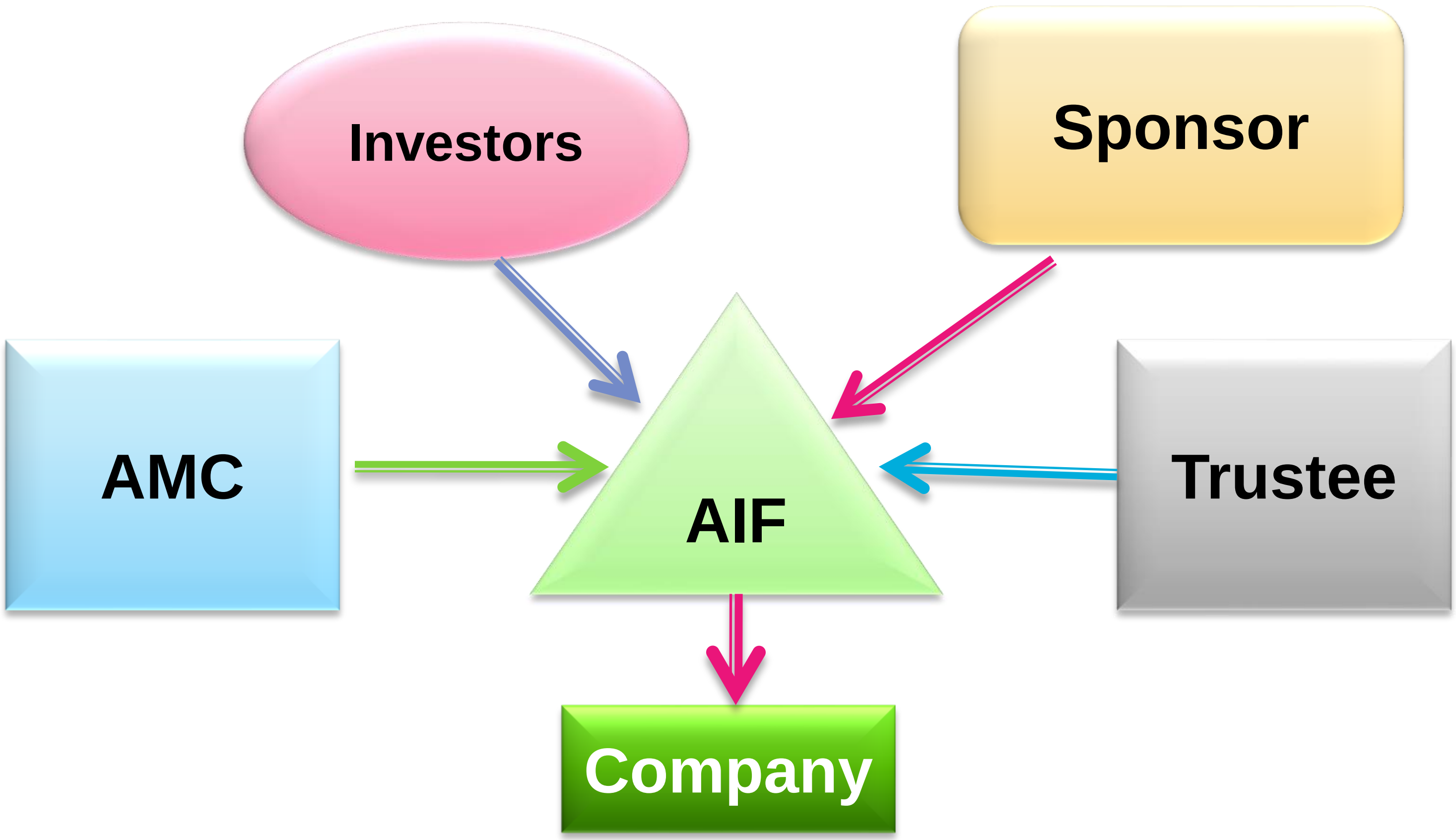
Infrastructure Investment Trust



InvIT Example

- **IRB InvIT Fund**
  - 7 Road Projects bought from IRB Infra. Developers Ltd
  - Units listed on NSE/BSE
  - **38%** of units held by FPIs
- **India GRID**
  - Power InvIT from Sterlite Power
    - **56%** of units held by FPIs
  - **Ind INfraVit** by L&T
    - **22%** held by FPIs

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 ≤ 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

AIF

- India Opportunities Fund (AIF-II) launched for Investments in Real Estate
  - Manager, Sponsor, Trustee all O&C by Indian citizens
  - Fund contributors all PROIs
  - Yet investment by AIF-II in RE treated as Domestic Investment
    - Such funds Can invest in RE Business / TDRs trading, Defence, Multi-brand.

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: MF

- New Category added by Rules: MF investing more than 50% in Equity Shares
  - Would need to check equity % allocation to overall portfolio
  - All MFs with more than 50% Foreign Ownership would become O&C by NRs
    - Investment in Shares ~ becomes Indirect FDI
    - MFs need to adhere to FDI Sectoral Caps / Restrictions / Conditions / Valuation
    - Reporting to DIPP within 30 days of Investment!
    - No clarity on how FDI Rules would apply to MF Industry!!

Sch.8: Investment Vehicle: MF

- Some AMCs which are clearly impacted
  - Nippon
  - Franklin Templeton
  - Principal
  - Mirae
  - BNP Paribas
  - HSBC
  - Invesco
- Q. Would **ICICI Pru AMC** & **HDFC AMC** also be covered since their Sponsors are clearly O&C by NRs

Sch.8: Investment Vehicle: MF

- E.g.: MFs want to buy Stock of **HDFC Bank**
  - Foreign Ownership Limit capped @ 74%
  - Its Current Foreign ownership is 64%
  - Now Foreign MFs can only buy 10% more while Domestic MFs can buy without any limit~ Clearly a disadvantage for Foreign MFs
- Q. What about existing Investments by these MFs? Should they divest these shares?

- SEBI has written to FinMin for Clarity on this Issue.

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

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	×

Sch.1 Not Applicable - Example

- Startup Company engaged in **B2C eCommerce**
  - FDI banned in B2C eCommerce under Sch.1

1. **NRI** Invst. on NR basis
   - NR treated as Domestic hence, allowed without any Limits
2. **Cat-I AIF** Invst which is O&C by Indians but has 100% FIs
   - AIF treated as Domestic hence, allowed without any Limits
3. **FVCI** Invst.
   - Allowed without Limits since Co. is a Startup

- **Combination of 1-3 can lead to FI of up to 100% on Auto Route**

THANK YOU!

www.ppsco.in
anup@ppsco.in