

GOVERNMENT REVAMPS OVERSEAS INVESTMENT RULES: ALLOWS INVESTMENT IN FINANCIAL SERVICES, DEFERRED PAYMENT OF CONSIDERATION & OTHER CHANGES

With a view to liberalize and promote ease of doing business in India, the Central Government and the Reserve Bank of India (RBI) have simplified the existing framework for overseas investment by persons resident in India and has notified the Foreign Exchange Management (Overseas Investment) Rules, 2022 (**OI Rules**) read with the Foreign Exchange Management (Overseas Investment) Regulations, 2022 (**OI Regulations**) and the Foreign Exchange Management (Overseas Investment) Directions, 2022 (**OI Directions**) in supersession of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015 (collectively OI Rules, OI Regulations and OI Directions are referred to as the **OI Regime**).

While clarity on certain aspects may be forthcoming in the near future, *prima facie* some of the key observations under the OI Regime are as follows:

Overseas Direct Investment (ODI) in financial services activity: An Indian entity which is not engaged in financial services activity in India has been permitted to make ODI in a foreign entity which is directly or indirectly engaged in financial services activity (except banking or insurance), subject to the condition that such Indian entity has posted net profits during the preceding three financial years. This was earlier not permitted and is likely to open doors for many Indian entities looking to invest in overseas financial services activities.

It is also interesting to note that the condition relating to obtaining of approval (as may be required) from regulators of relevant financial services activities, in India and host country/jurisdiction for engaging in such financial services activities in the host country/jurisdiction, (as applicable to an Indian entity engaged in financial services activities which intends to undertake such activity), is currently not applicable to an Indian entity which proposes to undertake financial services activity in host country/jurisdiction and is not engaged in the same in India.

Prior to the OI Regime, an Indian entity engaged in the financial services activity had to mandatorily obtain approval from the Indian regulator and regulator of host country/jurisdiction for undertaking financial services activity in the host country/jurisdiction. Under the present OI Regime, regulatory approval only if required, under Indian law or laws of the host country/jurisdiction, will need to be obtained. Family offices will likely explore this opportunity to invest overseas in financial services activity through their core investment company (**CICs**) and nonbank financial company (**NBFCs**).

Clarity on definitions of Overseas Direct Investment (ODI) and Overseas Portfolio Investment (OPI):

Overseas Direct Investment (ODI) has been defined as:

- acquisition of any unlisted equity capital (equity shares, perpetual capital, irredeemable or in the nature of fully and compulsorily convertible); or
- subscription as a part of the Memorandum of Association of a foreign entity, or
- with respect to listed foreign entity
 - investment in 10% or more of the paid-up equity capital of a listed foreign entity, or
 - investment with control where investment is less than 10% of the paid-up equity capital of a listed foreign entity. Control in this context shareholders agreement or voting agreements that entitle the holder to 10% or more of voting rights in the listed foreign company.
 - ODI investments will continued to be treated as such even where the above limits fall.

Overseas Portfolio Investment (OPI) has been defined as:

- investment, other than ODI, in foreign securities, but does not include
 - investment in any unlisted debt instruments; or
 - any security issued by a person resident in India who is not in an international financial services centre (**IFSC**).
 - any derivatives unless otherwise permitted by RBI; or
 - any commodities including Bullion Depository Receipts (**BDRs**)

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

Further, both in case of Indian entity and Resident Individuals specific investments have been identified as ODI and/or OPI. By defining the terms ODI and OPI, the Government has brought clarity on the distinction between the two, which has for long been debatable.

ODI-FDI investments: The OI Regime has permitted persons resident in India to make financial commitments in foreign entities that have invested prior to or invest into India at any time post such investment, either directly or indirectly, through structures **with up to two layers of subsidiaries**. By restricting only the number of layers and not investment into India, it prima facie appears that investment by a person in Indian in foreign entity which invests back in India has been permitted by the Government.

However, resident individuals can make overseas investments by way of ODI only in an operating foreign entity (not engaged in financial services activity) which does not have subsidiary or step down subsidiary where the resident individual has control (as defined in the OI Regime) in foreign entity.

Deferred payment of consideration: The OI Regime has permitted deferred payment of consideration for acquisition or transfer of foreign securities, subject to certain conditions, which was earlier not permitted.

Write-off on account of disinvestment: The OI Rules have dispensed with the requirement of approval for write-off on account of disinvestment. This is expected to make the process of disinvestment much faster and smoother.

Pricing to be at arms' length: The OI Rules require pricing to be done on arms' length basis for any issue or transfer of equity capital of a foreign entity from a person resident outside India or a person resident in India to a person resident in India who is eligible to make such investment or from a person resident in India to a person resident outside India. The onus has been put on the AD bank to ensure compliance with arm's length pricing taking into consideration the valuation as per any internationally accepted pricing methodology for valuation. Considering that the AD Banks will have flexibility to decide on this aspect, it is preferable that RBI specifies the guiding principles to determine 'arms length pricing'.

ODI in Start- Ups: ODI in start-ups is permitted to be made **only** out of internal accruals of the investing entity or own funds of the resident individual. As per the OI Rules, this investment is permitted in 'start-ups' recognised as such under the laws of the host country/host jurisdiction. Not many countries specifically define what is or is not a 'start-up', so in any country where there is no specific definition, this condition becomes infructuous. The RBI may need to clarify its position in this regard.

Grandfathering of transactions: The OI Regime mentions that any investment or financial commitment outside India **made in compliance with the earlier regime** and held as on the date of publication of the OI Rules shall be deemed to have been made under the OI Regime. However, if any investments or financial commitments have been made in the past which was not in accordance with the then prevailing law, then the OI Regime will not be applicable and specific compounding application will need to be made for the same.

Discontinuation of utilization of subsidiary / holding net worth: Prior to the OI Regime, an Indian entity for purposes of overseas investments, could utilize the net worth of its Indian subsidiary/holding company to the extent not availed of by the holding company or the subsidiary company, subject to certain conditions. However, the OI Directions now specify that the concept of utilizing the net-worth of subsidiary / holding company by the Indian entity has been discontinued. This would impact large conglomerates where subsidiaries are typically used to structure foreign investments.

The OI Regime is expected to open avenues for investment by Indian residents in foreign country/jurisdiction, which were earlier restricted, and provide array of opportunities while structuring transactions.

The key provisions of the aforementioned OI Rules and OI Regulations have been summarized below:

A. Foreign Exchange Management (Overseas Investment) Rules, 2022

Key definitions Overseas Investment, Financial Commitment, ODI, OPI	<ul style="list-style-type: none"> ▪ 'Overseas Investment' means financial commitment and Overseas Portfolio Investment (OPI) by a person resident in India. ▪ 'Financial Commitment' is the aggregate amount of investment made by a person resident in India by way of overseas direct investment (ODI), debt other than OPI in a foreign entity or entities in which the ODI is made and shall include the non fund-based facilities extended by such person to or on behalf of such foreign entity or entities; ▪ 'ODI' is investment (a) by way of acquisition of unlisted equity capital of a foreign entity, or (b) subscription as a part of the memorandum of association of a foreign entity, or (c) investment in 10% or more of the paid-up equity capital of a listed foreign entity or (d)
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	<p>investment with control where investment is less than 10% of the paid-up equity capital of a listed foreign entity. Where an investment by a person resident in India in the equity capital of a foreign entity is classified as ODI, such investment shall continue to be treated as ODI even if the investment falls to a level below 10% of the paid-up equity capital or such person loses control in the foreign entity.</p> <ul style="list-style-type: none"> ▪ 'OPI' means investment, other than ODI, in foreign securities, but not in any unlisted debt instruments or any security issued by a person resident in India who is not in an IFSC. OPI by a person resident in India in the equity capital of a listed entity, even after its delisting shall continue to be treated as OPI until any further investment is made in the entity. 				
Non- applicability of the OI Rules	<p>The OI Rules does not apply to:</p> <ul style="list-style-type: none"> ▪ any investment made outside India by a financial institution in an IFSC; ▪ acquisition or transfer of any investment outside India made: <ul style="list-style-type: none"> – out of Resident Foreign Currency Account; or – out of foreign currency resources held outside India by a person who is employed in India for a specific duration irrespective of length thereof or for a specific job or assignment, duration of which does not exceed three years; or – in accordance with Section 6(4) of FEMA. 				
Classification of debt and non-debt instruments	<table border="1"> <thead> <tr> <th style="text-align: center;">Debt Instruments</th> <th style="text-align: center;">Non-debt Instruments</th> </tr> </thead> <tbody> <tr> <td> <ul style="list-style-type: none"> ▪ Government bonds; ▪ corporate bonds; ▪ all tranches of securitization structure which are not equity tranche; ▪ borrowings by firms through loans; and ▪ depository receipts whose underlying securities are debt securities; </td> <td> <ul style="list-style-type: none"> ▪ Investments in equity in incorporated entities (public, private, listed and unlisted); ▪ capital participation in Limited Liability Partnerships; ▪ all instruments of investment as recognized in the Foreign Direct Investment policy from time to time; ▪ investment in units of Alternative Investment Funds and Real Estate Investment Trust and Infrastructure Investment Trusts; ▪ investment in units of mutual funds and Exchange-Traded Fund which invest more than 50% in equity; ▪ the junior-most layer (i.e. equity tranche) of securitization structure; ▪ acquisition, sale or dealing directly in immovable property; ▪ contribution to trusts; and ▪ depository receipts issued against equity instruments. </td> </tr> </tbody> </table>	Debt Instruments	Non-debt Instruments	<ul style="list-style-type: none"> ▪ Government bonds; ▪ corporate bonds; ▪ all tranches of securitization structure which are not equity tranche; ▪ borrowings by firms through loans; and ▪ depository receipts whose underlying securities are debt securities; 	<ul style="list-style-type: none"> ▪ Investments in equity in incorporated entities (public, private, listed and unlisted); ▪ capital participation in Limited Liability Partnerships; ▪ all instruments of investment as recognized in the Foreign Direct Investment policy from time to time; ▪ investment in units of Alternative Investment Funds and Real Estate Investment Trust and Infrastructure Investment Trusts; ▪ investment in units of mutual funds and Exchange-Traded Fund which invest more than 50% in equity; ▪ the junior-most layer (i.e. equity tranche) of securitization structure; ▪ acquisition, sale or dealing directly in immovable property; ▪ contribution to trusts; and ▪ depository receipts issued against equity instruments.
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Rights Issue and Bonus Issue	<p>Any person resident in India who has acquired and continues to hold equity capital of any foreign entity in accordance with FEMA or the rules or regulations made thereunder may invest in the equity capital issued by such entity as a rights issue or may be granted bonus shares subject to the OI Rules.</p> <p>The person resident in India acquiring the rights may renounce such rights in favour of a person resident in India or a person resident outside India.</p>				
Conditionalities for investment or financial commitment outside India	<p>No person resident in India to make or transfer any investment or financial commitment outside India except as provided under FEMA read with the OI Rules and regulations made FEMA.</p> <p>Investments made outside India by a person resident in India to be made subject to the following conditionalities:</p> <ul style="list-style-type: none"> ▪ Foreign entity should be engaged in a bona fide business activity: “Bonafide business activity” shall mean any business activity permissible under any law in force in India and the host country / host jurisdiction; 				

	<ul style="list-style-type: none"> ▪ Investment can be made directly or through step down subsidiary or the special-purpose vehicle, whereby the structure of such subsidiary or step down subsidiary of the foreign entity shall comply with the structural requirements of a foreign entity; ▪ Investment shall be subject to the limits and the conditions laid down in the OI Rules and the regulations. ▪ Prior approval of the Central Government required in case of overseas investment / transfer of investment in a foreign entity formed, registered or incorporated in Pakistan or in any other jurisdiction as may be advised by the Central Government from time to time. 	
<p>No objection certificate (NOC) required in certain cases</p>	<p><u>Circumstances where NOC is required:</u> NOC shall be required to be obtained from the lender bank or regulatory body or investigative agency prior to making any financial commitment or undertaking disinvestment under the OI Rules or OI Regulations where any resident in India:</p> <ul style="list-style-type: none"> ▪ has an account appearing as a non-performing asset; or ▪ is classified as a wilful defaulter by any bank; or ▪ is under investigation by a financial service regulator or by investigative agencies in India, namely, the Central Bureau of Investigation or Directorate of Enforcement or Serious Frauds Investigation Office, <p><u>Failure to furnish NOC:</u> If the lender bank or regulatory body or investigative agency concerned fails to furnish the certificate within 60 days from the date of receipt of such application, it may be presumed that there was no objection to the proposed transaction.</p>	
<p>Overseas Direct Investment (ODI) by Indian entity Instruments for ODI, ODI in financial services activity, limits on financial commitment</p>	<p>Manner of making ODI</p>	<p>ODI to be made by way of investment in equity capital for the purpose of undertaking bonafide business activity.</p> <p><u>Instruments for ODI:</u> ODI may be made or held by way of:</p> <ul style="list-style-type: none"> ▪ subscription as part of memorandum of association or purchase of equity capital, listed or unlisted; ▪ acquisition through bidding or tender procedure; ▪ acquisition of equity capital by way of rights issue or allotment of bonus shares; ▪ capitalization, within the time period, if any, specified for realization under FEMA, of any amount due towards the Indian entity from the foreign entity, the remittance of which is permitted under FEMA or does not require prior permission of the Central Government or the RBI under FEMA or any rules or regulations made or directions issued thereunder; ▪ the swap of securities; ▪ merger, demerger, amalgamation or any scheme of arrangement as per the applicable laws in India or laws of the host country / host jurisdiction.
<p>ODI in financial services activity</p>	<p><i>Indian entity engaged in financial services activity can make ODI in foreign entity, which is directly or indirectly engaged in financial services activity</i>, subject to the following conditions:</p> <ul style="list-style-type: none"> ▪ Indian entity has posted net profits during the preceding 3 financial years; ▪ Indian entity is registered with or regulated by a financial services regulator in India; ▪ Indian entity has obtained approval as may be required from the regulators of such financial services activity, both in India and the host country / host jurisdiction, for engaging in such financial services. 	

		<p>Indian entity not engaged in financial services activity can make ODI in a foreign entity, which is directly or indirectly engaged in financial services activity, subject to the condition that such Indian entity has posted net profits during the preceding 3 financial years.</p> <p>Further, an Indian entity not engaged in the insurance sector may make ODI in general and health insurance where such insurance business is supporting the core activity undertaken overseas by such an Indian entity.</p> <p>A foreign entity shall be considered to be engaged in the business of financial services activity if it undertakes an activity, which if carried out by an entity in India, requires registration with or is regulated by a financial sector regulator in India.</p> <p>Exemption from net profit requirement: If an Indian entity does not meet the net profits requirement due to the impact of Covid-19 during the period from 2020-2021 to 2021-2022, then the financial results of such period may be excluded for considering the profitability period of 3 years. Such period may be extended by RBI in consultation with the Central Government.</p> <p>Non-applicability of these conditions: Overseas Investment by banks and non-banking financial institutions regulated by the RBI shall be subject to the conditions laid down by RBI in this regard.</p>	
	<p>Limit for financial commitment</p>	<ul style="list-style-type: none"> ▪ Total financial commitment (TFC) made by an Indian entity in all the foreign entities taken together at the time of undertaking such commitment not to exceed 400% of its net worth as on the date of the last audited balance sheet. ▪ TFC not to include capitalization of retained earnings for determining such limit but shall include: <ul style="list-style-type: none"> – utilization of the amount raised by the issue of American Depository Receipts or Global Depository Receipts and stock-swap of such receipts; and – utilization of the proceeds from External Commercial Borrowings to the extent the corresponding pledge or creation of charge on assets to raise such borrowings has not already been reckoned towards the above limit. ▪ Exemption from TFC has been provided to Maharatna or Navratna or Miniratna or subsidiaries of such public sector undertakings in foreign entities outside India engaged in strategic sectors. 	
<p>Overseas Portfolio Investment (OPI) by an Indian entity</p>		<p>An Indian entity may make OPI which shall not exceed 50% of its net worth as on the date of its last audited balance sheet, subject to the following:</p> <ul style="list-style-type: none"> ▪ A listed Indian company may make OPI including by way of reinvestment. ▪ An unlisted Indian entity may make OPI only by way of: <ul style="list-style-type: none"> – acquisition of equity capital by way of rights issue or allotment of bonus shares; – capitalization, within the time period, if any, specified for realization under FEMA, of any amount due towards the Indian entity from the foreign entity, the remittance of which is permitted under the Act or does not require prior permission of the Central Government or the RBI under FEMA or any rules or regulations made or directions issued thereunder; – the swap of securities; – merger, demerger, amalgamation or any scheme of arrangement as per the applicable laws in India or laws of the host country / host jurisdiction. 	
<p>Overseas Investment by</p>	<p>Manner of making</p>	<ul style="list-style-type: none"> ▪ Any resident individual may make ODI by way of investment in equity capital or OPI and shall be subject to the overall ceiling under the Liberalized Remittance Scheme of RBI (LRS). 	

resident individual	overseas investment	<ul style="list-style-type: none"> ▪ <i>Instruments for overseas investment:</i> A resident individual may make or hold overseas investment by way of: <ul style="list-style-type: none"> – ODI in an operating foreign entity not engaged in financial services activity and which does not have subsidiary or step down subsidiary where the resident individual has control in the foreign entity; – OPI, including by way of reinvestment; – ODI or OPI, as the case may be, by way of: <ul style="list-style-type: none"> (a) capitalization, within the time period, if any, specified for realization under FEMA, of any amount due from the foreign entity the remittance of which is permitted under FEMA or does not require prior permission of the Central Government or RBI; (b) swap of securities on account of a merger, demerger, amalgamation or liquidation; (c) acquisition of equity capital through rights issue or allotment of bonus shares; (d) gift; (e) inheritance; (f) acquisition of sweat equity shares; (g) acquisition of minimum qualification shares issued for holding a management post in a foreign entity; (h) acquisition of shares or interest under Employee Stock Ownership Plan (ESOP) or Employee Benefits Scheme (EBF). <p>ODI in respect of clauses (e), (f), (g) and (h) may be made in a foreign entity whether or not such foreign entity is engaged in financial services activity or has subsidiary or step down subsidiary where the resident individual has control.</p> <p>Acquisition of less than 10% of the equity capital, whether listed or unlisted, of a foreign entity without control under clauses (f), (g) and (h), will be treated as OPI.</p>
	Acquisition by way of gift or inheritance	<ul style="list-style-type: none"> ▪ A resident individual may, without any limit, acquire foreign securities by way of inheritance from a person resident in India who is holding such securities or from a person resident outside India. ▪ A resident individual, without any limit, may acquire foreign securities by way of gift from a person resident in India who is a relative and holding such securities. ▪ A resident individual may acquire foreign securities by way of gift from a person resident outside India in accordance with the provisions of the Foreign Contribution (Regulation) Act, 2010 and the rules and regulations made thereunder.
Overseas Investment by person resident in India other than Indian entity and resident individual	ODI by Registered Trust or Society	<p>Registered trust or a registered society engaged in the educational sector or which has set up hospitals in India may make ODI in a foreign entity with the prior approval of RBI, subject to the following conditions:</p> <ul style="list-style-type: none"> ▪ the foreign entity is engaged in the same sector as the Trust/Society; ▪ the Trust / Society should have been in existence for at least 3 financial years before the year in which such investment is being made;

	<ul style="list-style-type: none"> ▪ the constitutional documents of the Trust/Society permit the proposed ODI; ▪ such investment have the approval of the trustees in case of a Trust and the governing body or council or managing or executive committee in case of a Society; ▪ in case the Trust / Society require special licence or permission from the Central Government/ relevant local authority, the special licence or permission has been obtained and submitted to the designated AD bank. 	
	<p>Overseas investments by Mutual Funds (MF) or Venture Capital Funds (VCF) or Alternative Investment Funds (AIF)</p>	<p>A MF / VCF/ AIF (Funds) may acquire or transfer foreign securities as stipulated by SEBI from time to time in accordance with the OI Rules and other applicable laws.</p> <ul style="list-style-type: none"> ▪ Limits on investment to be decided by the concerned regulatory body (RBI for aggregate limits, SEBI for individual limits); ▪ Investments by Funds to be routed through the AD Bank ▪ Investment made by Funds to be treated as OPI.
<p>Overseas Investment in IFSC by person resident in India</p>	<p>Person resident in India may make overseas investment in an IFSC in the manner as laid down in Schedule I / II/ III/ IV of the OI Rules, subject to the following:</p> <ul style="list-style-type: none"> ▪ in the case of an ODI made in an IFSC, the approval by the financial services regulator concerned, wherever applicable, shall be decided within 45 days from the date of application complete in all respects failing which it shall be deemed to be approved; ▪ an Indian entity not engaged in financial services activity in India, making ODI in a foreign entity, which is directly or indirectly engaged in financial services activity, except banking or insurance, who does not meet the net profit requirement, may make ODI in an IFSC; ▪ a person resident in India may make contribution to an investment fund or vehicle set up in an IFSC as OPI; ▪ a resident individual may make ODI in a foreign entity, including an entity engaged in financial services activity, (except in banking and insurance), in IFSC if such entity does not have subsidiary or step down subsidiary outside IFSC where the resident individual has control in the foreign entity. 	
<p>Pricing guidelines</p>	<p>Issue or transfer of equity capital of a foreign entity from (i) a person resident outside India / person resident in India to a person resident in India who is eligible to make such investment; or (ii) person resident in India to a person resident outside India, is required to be at <i>a price arrived on an arm's length basis.</i></p> <p>AD bank is required to ensure compliance with arm's length pricing taking into consideration the valuation as per any internationally accepted pricing methodology for valuation before facilitating such transaction.</p>	
<p>Transfer or liquidation</p>	<p><u>Transfer by way of sale:</u> A person resident in India holding equity capital is permitted to transfer such investment by way of sale to a person resident in India, who is eligible to make such investment under the OI Rules, or to a person resident outside India.</p> <p><u>Transfer under merger/ amalgamation/ demerger/ buyback:</u> In case the transfer is on account of merger/ amalgamation/ demerger/ on account of buyback of foreign securities, such transfer or liquidation in case of liquidation of the foreign entity, shall have the approval of the competent authority as per the applicable laws in India or the laws of the host country / host jurisdiction.</p> <p><u>Disinvestment by a person resident in India:</u> Such divestment shall be subject to the following conditions:</p>	

	<ul style="list-style-type: none"> ▪ the transferor, in case of full disinvestment other than by way of liquidation, shall not have any dues outstanding for receipt, which such transferor is entitled to receive from the foreign entity as an investor in equity capital and debt; ▪ the transferor, in case of any disinvestment must have stayed invested for at least 1 year from the date of making ODI: <p>The above conditions for disinvestment will not apply in case of a merger/ demerger / amalgamation between 2 or more foreign entities that are wholly-owned, directly or indirectly, by the Indian entity or where there is no change or dilution in aggregate equity holding of the Indian entity in the merged or demerged or amalgamated entity.</p>
<p>Restructuring of balance sheet of person resident in India who has made ODI in a foreign entity, permitted by such foreign entity</p>	<p><u>Restructuring by foreign entity:</u> Person resident in India who has made ODI in a foreign entity may permit restructuring of the balance sheet by such foreign entity, which has been incurring losses for the previous 2 years as evidenced by its last audited balance sheets, subject to ensuring compliance with reporting, documentation requirements and subject to the diminution in the total value of the outstanding dues towards such person resident in India on account of investment in equity and debt, after such restructuring not exceeding the proportionate amount of the accumulated losses.</p> <p><u>Diminution in value to be certified:</u> In case of such diminution where the amount of corresponding original investment is more than USD 10 million or in the case where the amount of such diminution exceeds 20% of the total value of the outstanding dues towards the Indian entity or investor, the diminution in value shall be duly certified on an arm's length basis by a registered valuer as per the Companies Act, 2013 or corresponding valuer registered with the regulatory authority or certified public accountant in the host jurisdiction. The certificate dated not more than 6 months before the date of the transaction to be submitted to the designated AD bank.</p>
<p>Restrictions and prohibitions of ODI in certain sectors</p>	<p><u>Prohibition on ODI in the following sectors:</u></p> <ul style="list-style-type: none"> ▪ real estate activity, which means buying and selling of real estate or trading in Transferable Development Rights but does not include the development of townships, construction of residential or commercial premises, roads or bridges for selling or leasing; ▪ gambling in any form; and ▪ dealing with financial products linked to the Indian rupee without specific approval of the RBI. <p><u>Restriction on ODI in start-ups:</u> Any ODI in start-ups recognized under the laws of the host country / host jurisdiction, to be made by an Indian entity only from the internal accruals whether from the Indian entity or group or associate companies in India and in case of resident individuals, from own funds of such an individual.</p> <p><u>ODI not to result in a structure with more than 2 layers of subsidiaries:</u> No person resident in India to make financial commitment in a foreign entity that has invested or invests into India, at the time of making such financial commitment or at any time thereafter, either directly or indirectly, resulting in a structure with more than two layers of subsidiaries. This restriction is not applicable to the classes of companies provided under Rule 2(2) of the Companies (Restriction on Number of Layers) Rules, 2017.</p>
<p>Restriction on acquisition or transfer of immovable property outside India</p>	<ul style="list-style-type: none"> ▪ <u>Permission of RBI:</u> No person resident in India can acquire or transfer any immovable property situated outside India without the general or special permission of RBI. However, RBI permission is not required for a property: <ul style="list-style-type: none"> – held by a person resident in India who is a national of a foreign State; – acquired by a person resident in India on or before the 8th day of July, 1947 and continued to be held by such person with the permission of the RBI; – acquired by a person resident in India on a lease not exceeding 5 years. ▪ <u>Acquisition from person resident in India:</u> Person resident in India may acquire immovable property outside India by way of inheritance or gift or purchase from a person resident in

	<p>India who has acquired such property as per the foreign exchange provisions in force at the time of such acquisition;</p> <ul style="list-style-type: none"> ▪ <u>Acquisition from person resident outside India:</u> Person resident in India may acquire immovable property outside India from a person resident outside India: <ul style="list-style-type: none"> – by way of inheritance; – by way of purchase out of foreign exchange held in RFC account; – by way of purchase out of the remittances sent under LRS. Such remittances under LRS may be consolidated in respect of relatives if such relatives, being persons resident in India, comply with the terms and conditions of the Scheme; – jointly with a relative who is a person resident outside India; – out of the income or sale proceeds of the assets, other than ODI, acquired overseas under FEMA. ▪ <u>Acquisition by Indian entity having an overseas office:</u> Indian entity having an overseas office may acquire immovable property outside India for the business and residential purposes of its staff, as per RBI directions issued from time to time. ▪ Person resident in India who has acquired any immovable property outside India in accordance with the foreign exchange provisions in force at the time of such acquisition may: <ul style="list-style-type: none"> – transfer such property by way of gift to a person resident in India who is eligible to acquire such property under the OI Rules or by way of sale; – create a charge on such property in accordance with FEMA or the rules or regulations made thereunder or RBI directions issued from time to time.
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The OI Rules have been notified vide MOF notification dated August 22, 2022 ([available here](#)).

B. Foreign Exchange Management (Overseas Investment) Regulations, 2022

Salient features of the OI Regulations have been discussed hereinbelow:

Financial commitment by Indian entity by modes other than equity capital	<p>Indian entity may lend or invest in any debt instrument issued by a foreign entity or extend non fund-based commitment to or on behalf of a foreign entity including overseas step down subsidiaries of such Indian entity subject to the following conditions within the financial commitment limit as prescribed in the OI Rules:</p> <ul style="list-style-type: none"> ▪ the Indian entity is eligible to make ODI; ▪ the Indian entity has made ODI in the foreign entity; ▪ the Indian entity has acquired control in such foreign entity at the time of making such financial commitment.
Financial commitment by Indian entity by way of debt	<p>An Indian entity may lend or invest in any debt instruments issued by a foreign entity subject to the condition that such loans are duly backed by a loan agreement where the rate of interest shall be charged on an arm's length basis. "Arm's length" means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.</p>
Financial commitment by way of guarantee	<ul style="list-style-type: none"> ▪ <u>Issuance of guarantees:</u> The following guarantees may be issued to or on behalf of the foreign entity or any of its step down subsidiary in which the Indian entity has acquired control through the foreign entity: <ul style="list-style-type: none"> – corporate or performance guarantee by such Indian entity; – corporate or performance guarantee by a group company of such Indian entity in India, being a holding company (which holds at least 51% stake in the Indian entity) or a subsidiary company (in which the Indian entity holds at least 51% stake) or a promoter group company, which is a body corporate; – personal guarantee by the resident individual promoter of such an Indian entity; – bank guarantee, which is backed by a counter-guarantee or collateral by the Indian entity or its group company as above, and issued, by a bank in India. ▪ <u>Guarantee extended by a group company:</u> Where the guarantee is extended by a group company, it shall be counted towards the utilisation of its financial commitment limit independently and in case of a resident individual promoter, the same shall be counted towards the financial commitment limit of the Indian entity.

	<ul style="list-style-type: none"> – Where the commitment is extended by a group company, any fund-based exposure to or from the Indian entity shall be deducted from the net worth of such group company for computing its financial commitment limit – Where the guarantee is extended by a promoter, which is a body corporate or an individual, the Indian entity shall be a part of the promoter group. ▪ Guarantee cannot be open-ended. ▪ The guarantee, to the extent of the amount invoked, shall cease to be a part of the non-fund based commitment but be considered as lending. ▪ <u>Guarantee extended jointly and severally by 2 or more Indian entities:</u> 100% of the amount of such guarantee shall be reckoned towards the individual limits of each of such Indian entities. ▪ <u>Performance guarantee:</u> 50% of the amount of guarantee shall be reckoned towards the financial commitment limit. ▪ <u>Roll over guarantee:</u> Roll-over of guarantee shall not be treated as fresh financial commitment where the amount on account of such roll-over does not exceed the amount of original guarantee.
<p>Financial commitment by way of <u>pledge or charge</u></p>	<p><u>Creation of pledge or charge:</u> Indian entity, which has made ODI by way of investment in equity capital in a foreign entity is permitted to:</p> <ul style="list-style-type: none"> ▪ <u>Create a pledge in favour of an AD bank / public financial institution in India / overseas lender:</u> Indian entity may pledge the equity capital of the foreign entity in which it has made ODI or of its step down subsidiary outside India, held directly by the Indian entity in a foreign entity and indirectly in step down subsidiary, in favour of an AD bank or a public financial institution in India or an overseas lender, for availing fund based or non-fund based facilities for itself or for any foreign entity in which it has made ODI or its step down subsidiaries outside India or in favour of a debenture trustee registered with SEBI for availing fund based facilities for itself. ▪ <u>Create a charge by way of mortgage, pledge, hypothecation or other identical modes on:</u> <ul style="list-style-type: none"> – its assets in India, including the assets of its group company or associate company, promoter or director, in favour of an AD bank or a public financial institution in India or an overseas lender as security for availing of the fund based or non-fund based facility or both, for any foreign entity in which it has made ODI or for its step down subsidiary outside India; or – the assets outside India of the foreign entity in which it has made ODI or of its step down subsidiary outside India in favour of an AD bank in India or a public financial institution in India as security for availing of the fund based or non-fund based facility or both, for itself or any foreign entity in which it has made ODI or for its step down subsidiary outside India or in favour of a debenture trustee registered with SEBI in India for availing fund based facilities for itself. <p><u>Conditions for creation of pledge or charge:</u></p> <ul style="list-style-type: none"> ▪ value of the pledge / charge or the amount of the facility, whichever is less, shall be reckoned towards the financial commitment limit provided such facility has not already been reckoned towards such limit and excluding cases where the facility has been availed by the Indian entity for itself; ▪ overseas lender in whose favour there is such a pledge or charge shall not be from any country or jurisdiction in which financial commitment is not permissible under the OI Rules; ▪ creation or enforcement of such pledge or charge shall be in accordance with FEMA or rules or regulations made or directions issued thereunder.
<p>Acquisition or transfer of equity capital by way of deferred payment under</p>	<p><u>Deferred payment of consideration for equity capital:</u></p> <p>Where a person resident in India acquires equity capital by way of subscription to an issue or by way of purchase from a person resident outside India or where a person resident outside India acquires equity capital by way of purchase from a person resident in India, and where such equity capital is reckoned as ODI, the payment of amount of consideration for the equity capital</p>

<p>the terms of the agreement</p>	<p>acquired may be deferred for such definite period from the date of the agreement as provided in such agreement subject to the following:</p> <ul style="list-style-type: none"> ▪ the foreign securities equivalent to the amount of total consideration shall be transferred or issued upfront by the seller to the buyer; ▪ the full consideration finally paid shall be compliant with the applicable pricing guidelines; ▪ the deferred part of the consideration in case of acquisition of equity capital of a foreign entity by a person resident in India shall be treated as non-fund based commitment. <p><u>Indemnification of buyer:</u></p> <p>The buyer may be indemnified by the seller up to such amount and be subject to such terms and conditions as may be mutually agreed upon and laid down in the agreement.</p>
<p>Modes of payment</p>	<p>A person resident in India making OI may make payment:</p> <ul style="list-style-type: none"> ▪ by remittance made through banking channels; ▪ from funds held in an account maintained in accordance with FEMA; ▪ by swap of securities; ▪ by using the proceeds of American Depository Receipts or Global Depository Receipts or stock-swap of such receipts or external commercial borrowings raised in accordance with FEMA and the rules and regulations made thereunder for making ODI or financial commitment by way of debt by an Indian entity.
<p>Obligations of person resident in India</p>	<ul style="list-style-type: none"> ▪ <u>Submission of documents as evidence for investment:</u> A person resident in India acquiring equity capital in a foreign entity, which is reckoned as ODI, to submit to the AD bank share certificates or any other relevant documents as per the applicable laws of the host country or the host jurisdiction, as the case may be, as an evidence of such investment in the foreign entity within six months from the date of effecting remittance or the date on which the dues to such person are capitalized or the date on which the amount due was allowed to be capitalized, as the case may be. ▪ <u>Unique Identification Number:</u> A person resident in India, through its designated AD bank, shall obtain a Unique Identification Number or “UIN” from the Reserve Bank for the foreign entity in which the ODI is intended to be made before sending outward remittance or acquisition of equity capital in a foreign entity, whichever is earlier. ▪ <u>Designation of one AD Bank:</u> All transactions relating to a particular UIN to be routed through AD Bank. Where more than one person resident in India makes financial commitment in the same foreign entity, all such persons shall route all transactions relating to that UIN through the AD bank designated for that UIN. ▪ <u>Realization and repatriation of dues to India:</u> A person resident in India having ODI in a foreign entity, wherever applicable, to realize and repatriate to India, all dues receivable from the foreign entity with respect to investment in such foreign entity, the amount of consideration received on account of transfer or disinvestment of such ODI and the net realizable value of the assets on account of the liquidation of the foreign entity as per the laws of the host country or the host jurisdiction, as the case may be, within ninety days from the date when such receivables fall due or the date of such transfer or disinvestment or the date of the actual distribution of assets made by the official liquidator. ▪ <u>Remittance towards earnest money:</u> Person resident in India who is eligible to make ODI permitted to make remittance towards earnest money deposit or obtain a bid bond guarantee from an AD bank for participation in bidding or tender procedure for the acquisition of a foreign entity. In case of an open-ended bid bond guarantee, it shall be converted into a close-ended guarantee not later than 3 months from the date of award of the contract.
<p>Reporting requirements for Overseas Investment</p>	<ul style="list-style-type: none"> ▪ All reporting by a person resident in India to be made through the designated AD Bank. ▪ Person resident in India to report the following for <u>ODI/ financial commitments/ undertaking disinvestment:</u>

	<ul style="list-style-type: none"> – financial commitment, whether it is reckoned towards the financial commitment limit or not, at the time of sending outward remittance or making a financial commitment, whichever is earlier; – disinvestment <u>within 30 days</u> of receipt of disinvestment proceeds; – restructuring <u>within 30 days</u> from the date of such restructuring. <ul style="list-style-type: none"> ▪ <u>OPI/ transfer of OPI by way of sale</u> to be reported within 60 days from the end of the half-year in which such investment or transfer is made as of September or March-end. ▪ <u>OPI by way of acquisition of shares or interest under ESOP/ EBF</u> to be reported by the office in India or branch of an overseas entity or a subsidiary in India of an overseas entity or the Indian entity in which the overseas entity has direct or indirect equity holding where the resident individual is an employee or director. ▪ <u>Submission of Annual Performance Report (APR)</u>: A person resident in India acquiring equity capital in a foreign entity which is reckoned as ODI, to submit APR with respect to each foreign entity every year by 31st December and where the accounting year of such foreign entity ends on 31st December, the APR shall be submitted by 31st December of the next year. <ul style="list-style-type: none"> – APR not required where (i) a person resident in India is holding less than 10% of the equity capital without control in the foreign entity and there is no other financial commitment other than by way of equity capital; or (ii) a foreign entity is under liquidation. – APR shall be based on the audited financial statements of the foreign entity. APR may be submitted based on unaudited financial statements certified as such by the statutory auditor of the Indian entity or by a chartered accountant where the statutory audit is not applicable, if the person resident in India does not have control in the foreign entity and the laws of the host country/ host jurisdiction do not provide for mandatory auditing of the books of accounts. – In case more than one person resident in India has made ODI in the same foreign entity, the person holding the highest stake in the foreign entity shall be required to submit APR and in case of holdings being equal, APR may be filed jointly by such persons. – Person resident in India shall report the details regarding acquisition or setting up or winding up or transfer of a step down subsidiary or alteration in the shareholding pattern in the foreign entity during the reporting year in the APR. ▪ <u>Submission of Annual Return on Foreign Liabilities and Assets</u> to be made in accordance with RBI directions.
<p>Delay in reporting Submission/ filing can be made with late submission fee</p>	<p>Person resident in India who does not submit the evidence of investment within the specified timeline or does not make any filing within the specified time for OI, may make such submission / filing along with Late Submission Fee within such period as may be advised, and at the rates and in the manner as may be directed by the RBI from time to time. Such facility can be availed within a maximum period of 3 years from the due date of such submission / filing.</p> <p>The OI Regulations also place a restriction on further financial commitment whether fund-based or non-fund-based, directly or indirectly, towards the foreign entity or transfer such investment till any delay in reporting is regularized.</p>

The OI Regulations were notified vide RBI notification dated August 22, 2022 ([available here](#)).

We trust you will find this an interesting read. For any queries or comments on this update, please feel free to contact us at insights@elp-in.com or write to our authors:

Yashojit Mitra, Partner – YashojitMitra@elp-in.com;

Mitesh Chauhan, Director – MiteshChauhan@elp-in.com

Devyani Singh, Director – DevyaniSingh@elp-in.com

Tanvi Goyal, Principal Associate – TanviGoyal@elp-in.com;

Aditi Ladha, Associate – AditiLadhai@elp-in.com

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