

Overview of FEMA

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Framework of FEMA



Overview of FEMA

❖ Statement of Objects of FEMA:

An Act to consolidate and amend the law relating to foreign exchange with the objective of *facilitating external trade and payments* and for *promoting the orderly development and maintenance of foreign exchange market* in India.

❖ Jurisdiction of FEMA:

- ✓ Whole of India (including J&K)
- ✓ Extra-territorial jurisdiction (since it applies even to branches, offices and agencies o/s India owned & controlled by a PRI)

❖ Policy Instruments under FEMA

- ✓ Notifications by RBI + CG for making / revising Regulations and Rules resp.
- ✓ A.P.(DIR Series) Circular by RBI
- ✓ Press Notes by DPIIT
- ✓ Master Directions by RBI
- ✓ FDI Policy by DPIIT

❖ Overall Scheme of FEMA:

- ✓ All current account transactions are freely permitted. However, CG can impose reasonable instructions.
- ✓ Capital account transactions are permitted to the extent allowed by RBI/CG
- ✓ RBI authorizes 'Authorized Persons' to deal in foreign exchange.

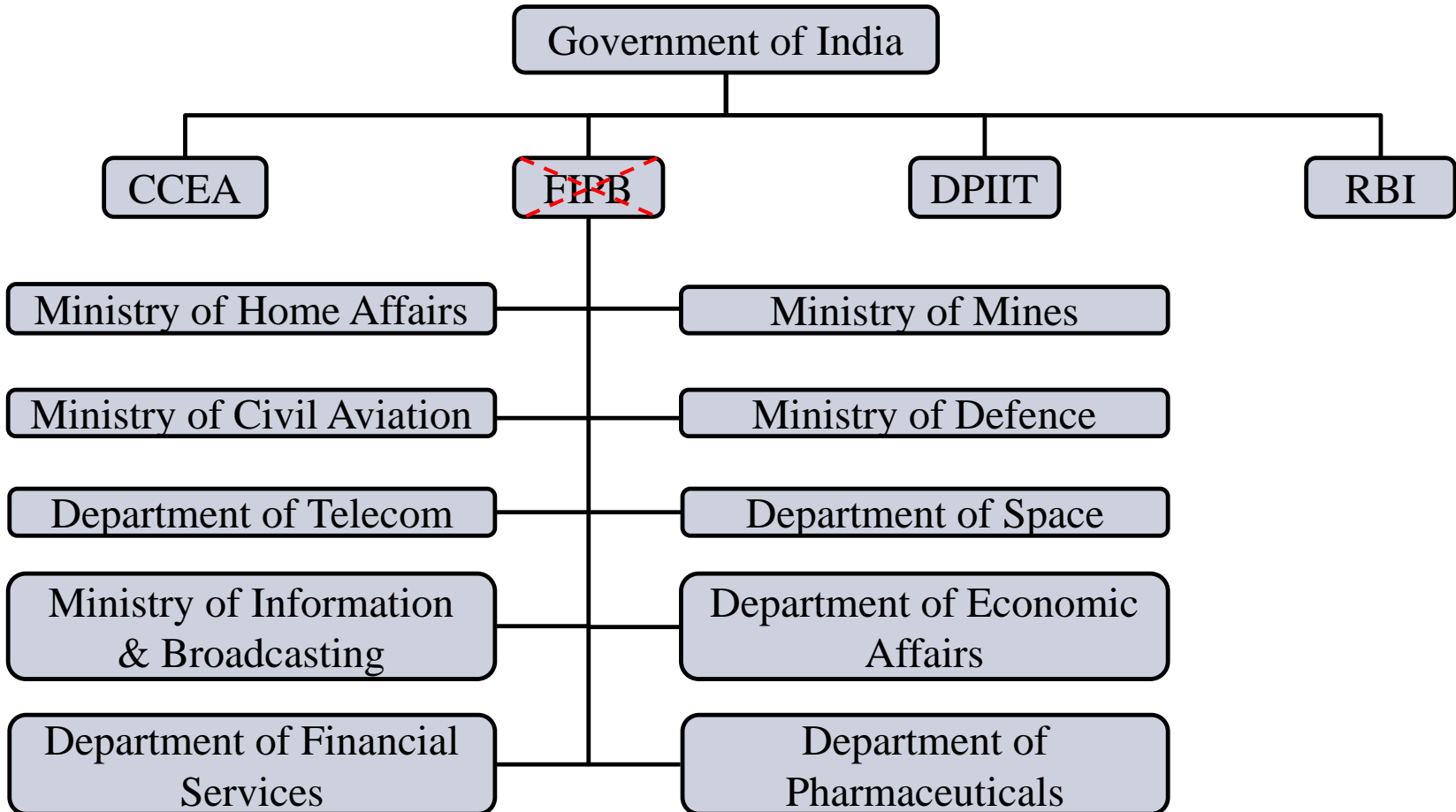
Overview of FEMA

Structure of FEMA

Chapter	Chapter title	Subject	Sections
I	Preliminary	Jurisdiction, Definitions	1-2
II	Regulation & Management of Forex	<ul style="list-style-type: none">• Restriction on manner and dealing with PROI• Holding of forex, foreign security & immovable property• Current a/c transactions• Capital a/c transactions• Export of goods & services• Realisation and repatriation of forex with exemptions	3-9
III	Authorised Persons	Provisions relating to Authorised Persons	10-12
IV	Contravention and Penalties	Provisions relating to Contravention, its consequences and Compounding	13-15
V	Adjudication and Appeal	<ul style="list-style-type: none">• Provisions relating to terms of service, composition, appointment of Adjudicating Authority, Members to Appellate Tribunal• Provisions relating to Appeal to Special Director (Appeals), Appellate Tribunal and High Court	16-35
VI	ED	Provisions relating to Appointment & Powers (*37A*)	36-38
VII	Miscellaneous	Power to make Rules and Regulations, etc	39-49

Overview of FEMA

Administration of FEMA



Overview of FEMA

Power to legislate on Capital Account Transactions

Debt Instruments [RBI]	Non-Debt Instruments [CG]
Government Bonds	All investments in equity in incorporated entities (public, private, listed and unlisted)
Corporate Bonds	Capital participation in Limited Liability Partnerships (LLPs)
All tranches of securitisation structure which are not equity tranche	All instruments of investment as recognised in the FDI policy as notified from time to time
Borrowings by Indian firms through loans	Investment in units of Alternative Investment Funds (AIFs) and Real Estate Investment Trust (REITs) and Infrastructure Investment Trusts (InVITs)
Depository receipts whose underlying securities are debt securities	Investment in units of mutual funds and Exchange-Traded Fund (ETFs) which invest more than fifty per cent in equity
Any other instrument not defined above shall be deemed as debt instrument.	The junior-most layer (i.e. equity tranche) of securitisation structure
	Acquisition, sale or dealing directly in immovable property
	Contribution to trusts, depository receipts issued against equity instruments
Any other instrument not defined above shall be deemed as debt instrument.	All investments in equity in incorporated entities (public, private, listed and unlisted)

Overview of FEMA

RBI – The Executive

❖ Administrative actions:

○ LIC v. Escorts (1986) 1 SCC 264

- *Once permission is granted by the Reserve Bank of India, ordinarily it is not open to anyone to go behind the permission and seek to question it. (Para 86)*
- *We do not, however, rule out the limited class of cases where the grant of permission by the Reserve Bank of India may be questioned, by an interested party in a proceeding under Article 226 of the Constitution, on the ground that it was mala fide or that there was no application of the mind or that it was opposed to the national interest as contemplated by the Act, being in contravention of the provisions of the Act and the rules, orders and directions issued under the Act. (Para 86)*

Overview of FEMA

RBI – The Executive

❖ Policy decisions:

- **Internet and Mobile Association of India Vs. RBI** [Writ Petition (Civil) Nos. 528 and 373 of 2018]
 - *RBI is not just like any other statutory body created by an Act of legislature..... RBI cannot be equated to any other statutory body that merely serves its master. It is specifically empowered to do certain things to the exclusion of even the central government. Therefore, to place its decisions at a pedestal lower than that of even an executive decision, would do violence to the scheme of the Act. (Para 6.139)*
 - *...the statutory scheme nevertheless provides for independence to the institution as such. Therefore, we do not accept the argument that a policy decision taken by RBI does not warrant any deference. (Para 6.141)*
 - *But nevertheless, the measure taken by RBI should pass the test of proportionality... (Para 6.156)*

Important Definitions under FEMA

def·i·ni·tion

\dē-fə'-nī-shən\

meaning of a word;
can be subjective

Definitions under FEMA, 1999

❖ Sec. 2(u) – “Person” includes

- ✓ an Individual,
- ✓ a Hindu undivided family,
- ✓ a company,
- ✓ a firm,
- ✓ an association of persons or body of individuals, whether incorporated or not,
- ✓ every artificial juridical person, not falling within any of the preceding sub-clauses, and
- ✓ any agency, office or branch owned or controlled by such person.

Definitions under FEMA, 1999

❖ Sec 2(v) – Person Resident in India:

□ Individuals

○ **Basic Rule:** > 182 days in preceding FY

○ **Exception 1 to Basic Rule:** Goes out of India for:

- ✓ For employment o/s India
- ✓ For carrying on business / vocation o/s India
- ✓ For any other purpose indicating intention to stay o/s India for uncertain period

○ **Exception 2 to Basic Rule:** Comes to India for:

- ✓ For employment in India
- ✓ For carrying on business / vocation in India
- ✓ For any other purpose indicating intention to stay in India for uncertain period

□ Other than Individuals

- ✓ any person or body corporate registered or incorporated in India
- ✓ an office, branch or agency in India owned or controlled by PROI
- ✓ an office, branch or agency outside India owned or controlled by PRI

Definitions under FEMA, 1999

❑ Individuals:

❖ **PRI but not permanently resident:** Employment for specified duration; specific job / assignment ≤ 3 years. Used at following places:

- No limit for possession of foreign currency in India – FEMA 11(R)
- Contribution to foreign PF / superannuation / pension fund for expatriate staff – FEMA 13(R)
- FEMA 120 not to apply when foreign security is purchased out of forex resources o/s India
- LRS not to apply for net salary remittance – Sch. III to CAT Rules, 2000

❖ **Basic rule mandatory satisfaction + 3 exceptions to be established with supporting documentation including visa:** MOF press release dated 1st Feb 2009 (Government's advice on acquiring land by persons residing outside India)

❖ **3 exceptions are superlative:** Designation of resident account as NRO upon change of residential status of account holder [FEMA 5(R)]

Definition under FEMA, 1999

❖ Sec. 2(e) – Capital a/c transaction:

- transaction which **alters the assets or liabilities, including contingent liabilities,** outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6

❖ Sec 2(j) – Current a/c transaction:

- transaction other than a capital account transaction **and without prejudice to the generality of the foregoing such transaction includes,**
 - ✓ payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business,
 - ✓ payments due as interest on loans and as net income from investments,
 - ✓ remittances for living expenses of parents, spouse and children residing abroad, and
 - ✓ expenses in connection with foreign travel, education and medical care of parents, spouse and children.

Capital Account vs. Current Account Transactions



FEMA Notification No. 1 – Permissible Capital a/c transactions

❖ Schedule I – For **Person Resident in India**:

Particulars	Relevant Notification
Investment by a person resident in India in foreign securities	FEM (Transfer or Issue of Any Foreign Security) Regulations, 2004 [Notification No. FEMA 120/2004-RB]
Foreign currency loans raised in India and abroad by a person resident in India	FEM (Borrowing and Lending) Regulations, 2018 [Notification No. FEMA 3(R)/2018-RB]
Transfer of immovable property outside India by a person resident in India	FEM (Acquisition and Transfer of Immovable property Outside India) Regulations, 2015 [Notification No. FEMA 7(R)/2015-RB]
Guarantees issued by a person resident in India in favour of a person resident outside India	FEM (Guarantees) Regulations, 2000 [Notification No. FEMA 8/2000-RB]
Export, import and holding of currency/currency notes	FEM (Possession and Retention of Foreign Currency) Regulations, 2015 [Notification No. FEMA 11(R)/2015-RB]
Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India	FEM (Borrowing and Lending) Regulations, 2018 [Notification No. FEMA 3(R)/2018-RB]

FEMA Notification No. 1 – Permissible Capital a/c transactions

❖ Schedule I – For **Person Resident in India**:

Particulars	Relevant Notification
Maintenance of foreign currency accounts in India and outside India by a person resident in India	FEM (Foreign Currency Accounts by a Person Resident in India) Regulations, 2015 [Notification No. FEMA 10(R)/2015-RB]
Taking out of insurance policy by a person resident in India from an insurance company outside India	FEM (Insurance) Regulations, 2015 [Notification No. FEMA 12(R)/2015-RB]
Loans and overdrafts by a person resident in India to a person resident outside India.	FEM (Borrowing and Lending) Regulations, 2018 [Notification No. FEMA 3(R)/2018-RB]
Remittance outside India of capital assets of a person resident in India	FEM (Remittance of Assets) Regulations, 2016 [Notification No. FEMA 13(R)/2016-RB]
Undertake derivative contracts	FEM (Foreign Exchange Derivative Contracts) Regulations, 2000 [Notification No. FEMA 25/2000-RB]

FEMA Notification No. 1 – Permissible Capital a/c transactions

❖ Schedule II – For **Person Resident Outside India**:

Particulars	Relevant Notification
Investment in India by a person resident outside India, that is to say, a) Issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; b) Investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of persons in India	FEM (Non-Debt Instruments) Rules, 2019.
Acquisition and transfer of immovable property in India by a person resident outside India	FEM (Non-Debt Instruments) Rules, 2019.
Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India	FEM (Guarantees) Regulations, 2000 [Notification No. FEMA 8/2000-RB]

FEMA Notification No. 1 – Permissible Capital a/c transactions

❖ Schedule II – For **Person Resident Outside India**:

Particulars	Relevant Notification
Import and export of currency/currency notes into/from India by a person resident outside India	FEM (Possession and Retention of Foreign Currency) Regulations, 2015 [Notification No. FEMA 11(R)/2015-RB]
Deposits between a person resident in India and a person resident outside India	FEM (Deposits) Regulations, 2016 [Notification No. FEMA 5(R)/2016-RB]
Foreign currency accounts in India of a person resident outside India	FEM (Deposits) Regulations, 2016 [Notification No. FEMA 5(R)/2016-RB]
Remittance outside India of capital assets in India of a person resident outside India	FEM (Remittance of Assets) Regulations, 2016 [Notification No. FEMA 13(R)/2016-RB]
Undertake derivative contracts	FEM (Foreign Exchange Derivative Contracts) Regulations, 2000 [Notification No. FEMA 25/2000-RB]

FEMA Notification No. 1 – Permissible Capital a/c transactions

❖ **Sec. 6(4) – PRI:** Assets abroad

❖ **Sec. 6(5) – PROI:** Assets in India

❖ **LRS and Capital account transactions:**

- Opening of foreign currency a/c abroad with a bank;
- Purchase of property abroad;
- Making portfolio investments abroad – acquisition & holding shares of both listed and unlisted overseas company or debt instruments;
- Acquisition of qualification shares of an overseas company for holding the post of Director;
- Acquisition of shares of a foreign company towards professional services rendered or in lieu of Director's remuneration;
- Investment in units of Mutual Funds, Venture Capital Funds, unrated debt securities, promissory notes;
- Outbound investment (Regulation 20A r.w. Schedule V);
- Extending loans including loans in Indian Rupees to Non-resident Indians (NRIs)/ PIO who are relatives as defined in Companies Act, 2013.

GSR 381(E) – Current a/c transactions

- ❖ **Schedule I – Transactions which are prohibited**
- ❖ **Schedule II – Transactions which require prior approval of Central Government**
- ❖ **Schedule III – Transactions requiring RBI approval above certain limits**
 - **LRS transactions for Individuals**
 - Private visits
 - Gift/donation
 - Going abroad on employment
 - Emigration
 - Maintenance of close relatives abroad
 - Business trip
 - Conference or meeting
 - Medical treatment or check-up abroad
 - Facilities available to students for pursuing their studies abroad (Also see Circular 45 of 2003)

GSR 381(E) – Current a/c transactions

❖ Schedule III – Transactions requiring RBI approval above certain limits

➤ Other facilities for persons other than individuals

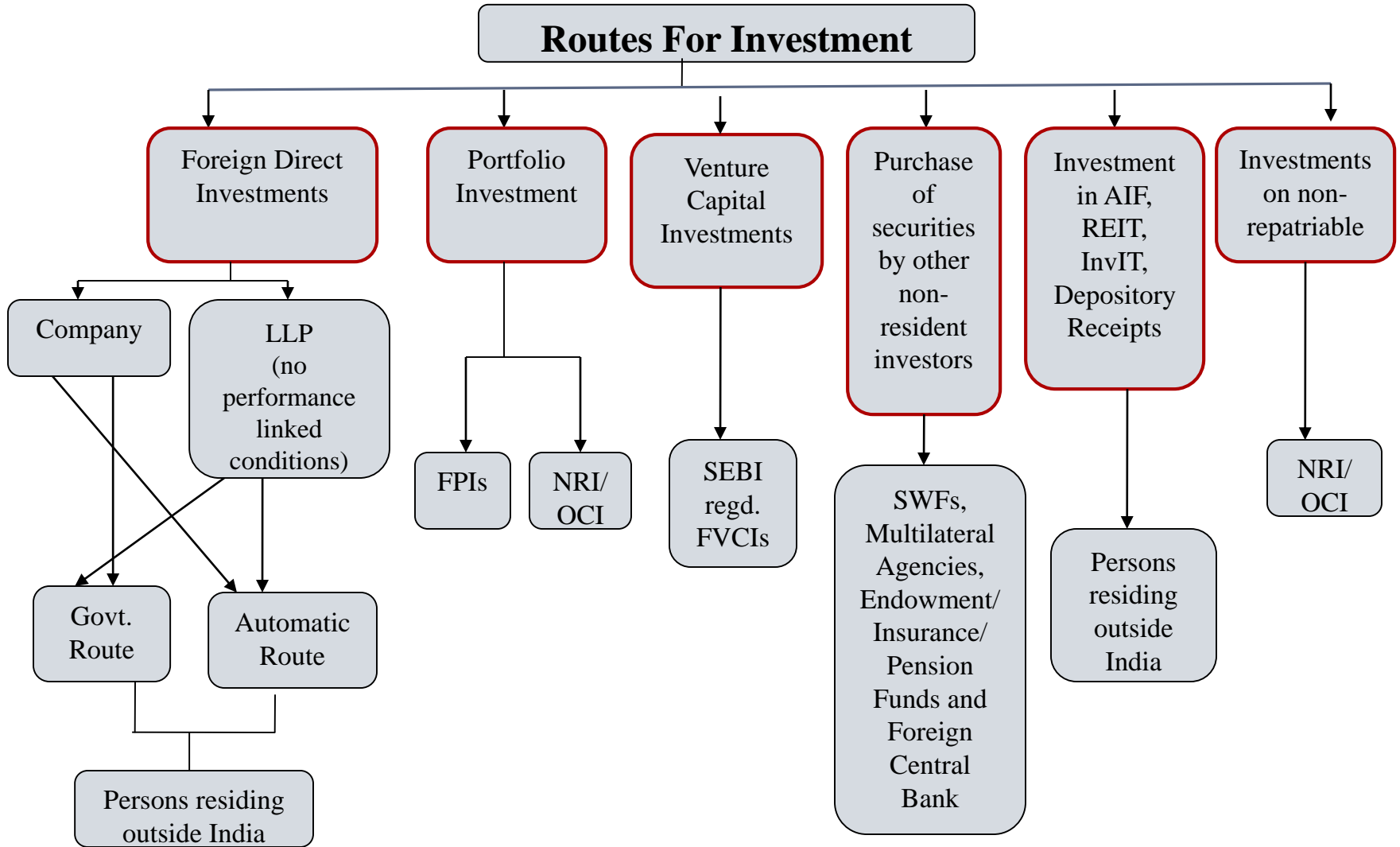
- Donations
 - ✓ Creation of chair
 - ✓ Contribution to funds promoted by educational institution
 - ✓ Contribution to technical institution
- Commission to foreign agents for sale of residential/commercial plots in India
- Remittances for consultancy services procured from outside India
- Remittance for re-imburement of pre-incorporation expenses

Inbound Investment



Inbound Investments

FEM (Non-Debt Instruments) Rules, 2019 dated 17.10.2019



Inbound Investments

FEM (Debt Instruments) Regulations, 2019 dated 17.10.2019

Routes for Investment

Foreign Portfolio Investors (FPIs)

Investment in Debt Instruments specified in this Regulation

NRIs/ OCIs

Repatriation Basis

- Government dated securities/ treasury bills/ units of domestic MF/ ETFs.
- Bonds issued by PSU or Infra. Debt funds.
- Listed Debentures/ non-convertible or RPS.
- National Pension System

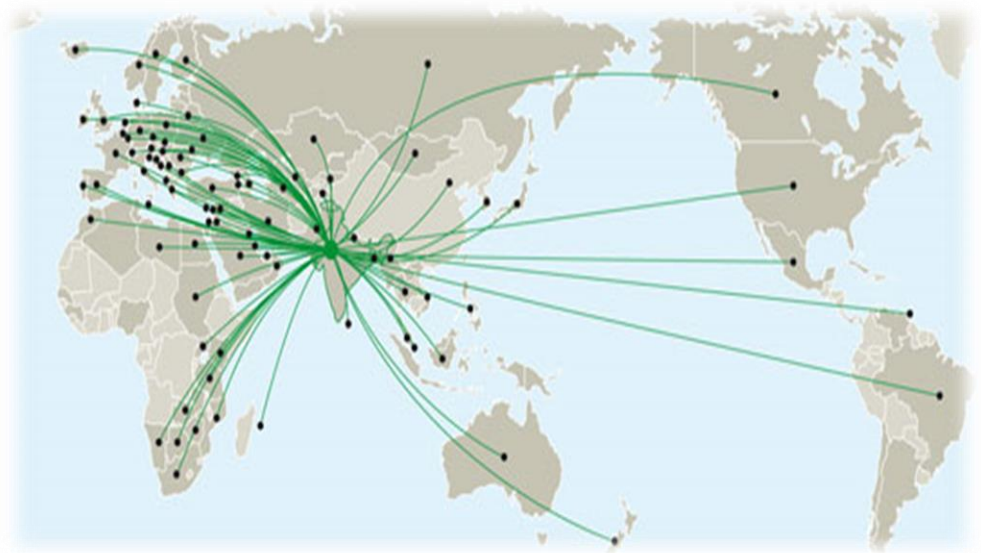
Non-Repatriation Basis

- Government securities/ treasury bills/ units of domestic MF / ETFs.
- National Plan/ Saving Certificates.
- Listed debentures/ non-convertible or RPS
- Chit fund

Foreign Central Banks or Multilateral Development banks

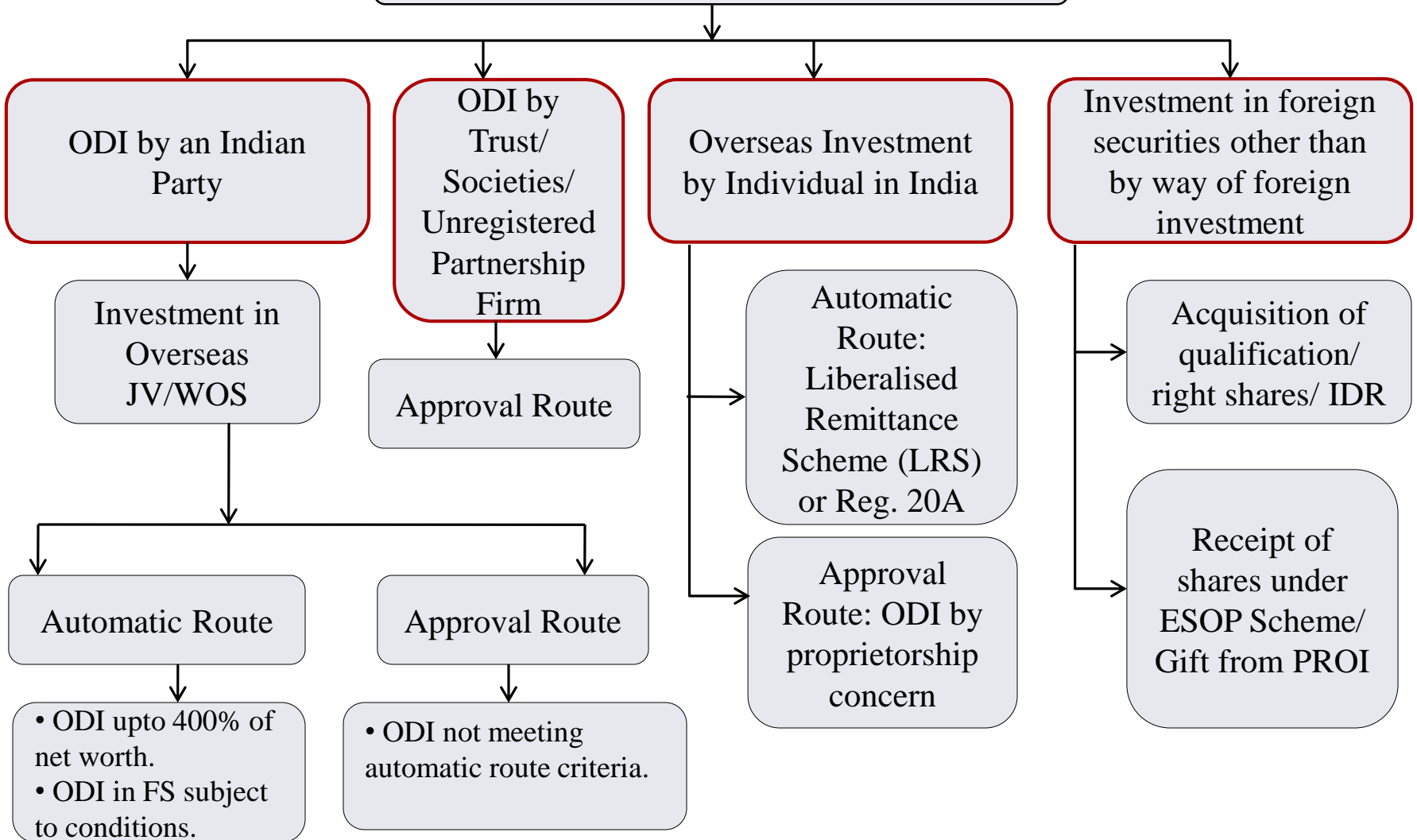
Government securities/ Treasury Bills

Outbound Investment



Outbound Investments

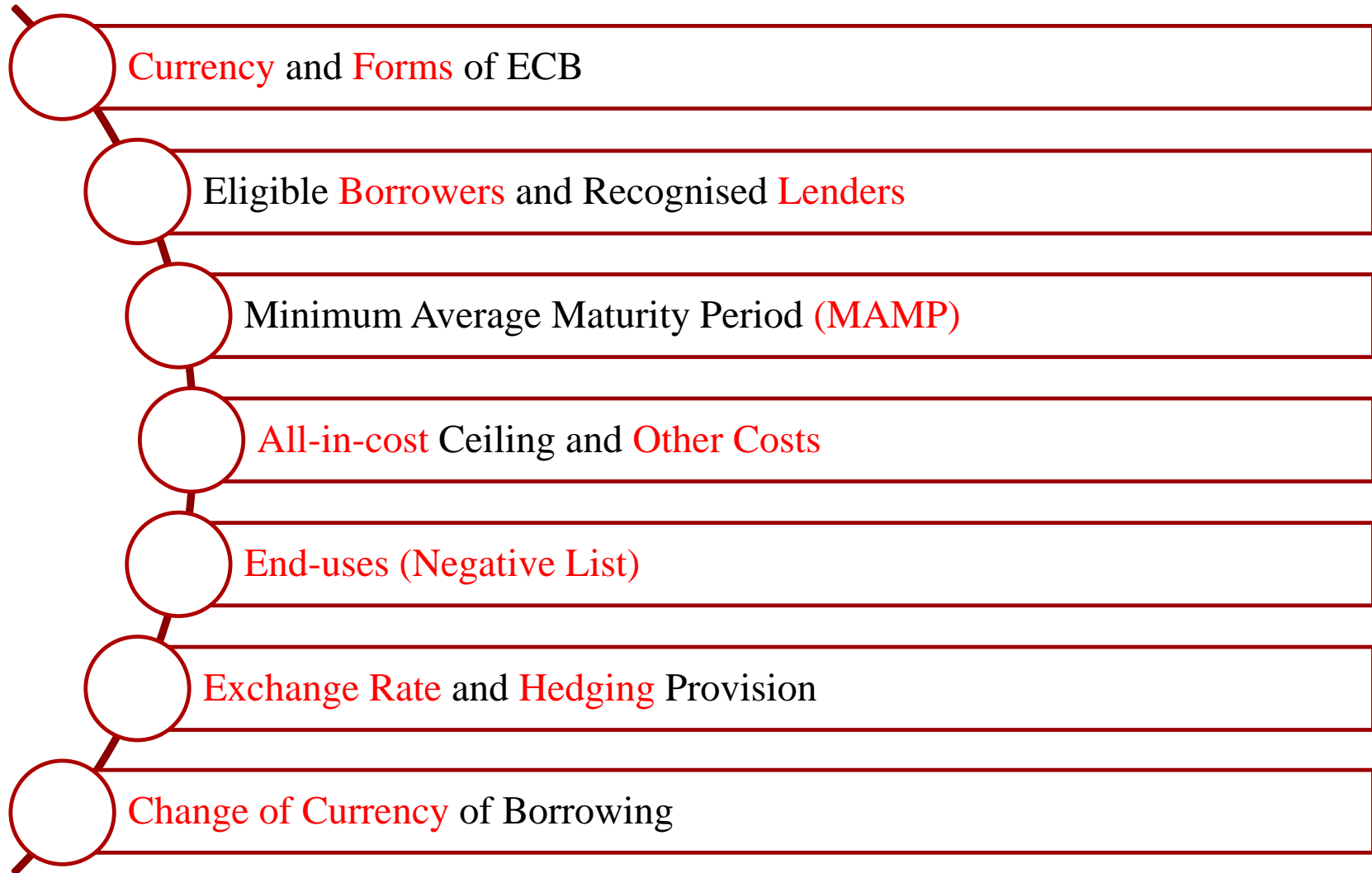
Routes for Overseas Investment



External Commercial Borrowing (ECB)



ECB Framework



Practice insights



Journey so far...

- Lack of domain knowledge amongst professionals – legal, accounting, secretarial & financial.
- Contraventions exposed only during legal due diligence / FEMA audit.
- Numerous and frequent changes in legislation by RBI & CG (for e.g. FDI changes).
- Grey areas under regulations leading to uncertainty (for e.g. overseas branch regulations).
- No direct interface with RBI. Interaction only through AD. Applies for compliance procedures as well as approvals.
- On several instances, have encountered ill-equipped teams of AD.
- Increasing overreach of ED.
- Difficulty in conveying complex FEMA Regs to overseas investors.
- Incongruity between compliance procedures – online vis-à-vis offline.

Thank you

